DOCKET

(1)

{SHDKT } PROCEEDINGS AND ORDERS DATE: 030685

CASE NBR 84-1-05811 CSY CASE STATUS: DECIDED
SHORT TITLE Gacy, John DOCKETED: Nov 26 1984
VERSUS Illinois

*** CAPITAL CASE ***

Entry	Date	Note	Proceedings and Orders
1	Nov 26 1984	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Dec 21 1984		Order extending time to file response to petition until January 25, 1985.
5	Jan 29 1985		Brief of respondent Illinois in opposition filed.
6	Jan 31 1985		DISTRIBUTED. February 15, 1985
8	Feb 19 1985		REDISTRIBUTED. February 22, 1985
10	Feb 25 1985		REDISTRIBUTED. March 1, 1985
12	Mar 4 1985		The petition for a writ of certiorari is denied. Justice Brennan, dissenting: Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case. Dissenting opinion by Justice Marshall.

CONTINUE {

PROCEEDINGS AND ORDERS DATE: 030685

CASE NBR 84-1-05811 CSY CASE STATUS: DECIDED
SHORT TITLE Gacy, John DOCKETED: Nov 26 1984
VERSUS Illinois

*** CAPITAL CASE ***

Entry	Date	Note	Proceedings and Orders
12	Mar 4 1985		The petition for a writ of certiorari is denied. Justice Brennan, dissenting: Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case. Dissenting opinion by Justice Marshall. (Detached opinion.) Justice Powell OUT.

****

PETITION FOR WRIT OF CERTIORARI

NO. 84-5811

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

Nov. 26, 1984

JOHN GACY,

Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

STEVEN CLARK
Deputy Defender

ALAN D. GOLDBERG
Assistant Appellate Defender
Office of the State Appellate Defender
109 North Dearborn Street-8th Floor
Chicago, Illinois 60602
(312) 793-5477

COUNSEL FOR PETITIONER

Of Counsel:
MICHAEL J. PELLETIER
Assistant Appellate Defender

QUESTIONS PRESENTED FOR REVIEW

1. Does a death penalty statute which vests unbridled discretion in the prosecutors as to who shall be subject to the death penalty violate the Eighth Amendment, as a majority of the Illinois Supreme Court has stated?

2. Does a death penalty statute violate the Eighth Amendment where, after a defendant is found eligible for a death sentence, it places the burden on the defendant to prove that senterce inappropriate and it requires the sentencer to impose a death sentence if this burden is not met?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JOHN GACY,

Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

INTRODUCTION

John Gacy, petitioner, respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Illinois affirming his convictions on 33 counts of murder, his sentence of death on twelve counts of murder, and his sentence of imprisonment for natural life on the remaining counts of murder.

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 103 Ill.2d 1, ___ N.E.2d ___ (1984). A copy of the opinion is attached hereto as Appendix A. An order denying rehearing is attached as Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(3). The opinion of the Supreme Court of Illinois was filed on June 6, 1984. A timely petition for rehearing was filed and subsequently denied on September 28, 1984. This petition is being filed within sixty days of the Illinois Supreme Court's denial of rehearing.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATUTORY PROVISION INVOLVED

Illinois Revised Statutes 1979, Chapter 38, Section 9-1 (g)

Procedure-Jury. If at the separate sentencing proceeding the jury finds that none of the factors set forth in subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections. If there is a unanimous finding by the jury that one or more of the factors set forth in subsection (b) exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.

Unless the jury unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

STATEMENT OF THE CASE

John Gacy was charged by indictments with the murders of 33 persons, and with one count of deviate sexual assault, one count of indecent liberties with a child, and one count of aggravated kidnapping. The offenses had allegedly occurred over a period of about seven years, but a single trial was held on all the indictments at the request of the defense. (C. 5785-89, R.402-6*)

Following this trial, at which the principal defense was insanity, the jury found the defendant guilty of all counts except the count charging aggravated kidnapping, on which the judge had granted a directed verdict of acquittal. (R. 5429-37, 2342-4) The case proceeded to a death penalty hearing on the following day on the twelve murder counts which allegedly had occurred after the effective date of the Illinois death penalty statute. Following stipulations and arguments, the jury returned a verdict sentencing John Gacy to death. (R. 5459-5520) Following this hearing, the judge sentenced John Gacy to natural life for each of the remaining 21 counts of murder. (R. 5528) No sentences were entered on the other two counts.

THE MANNER IN WHICH THE CONSTITUTIONAL CLAIMS WERE RAISED

The constitutionality of the Illinois death penalty statute was attacked prior to the death penalty hearing and on appeal in the Illinois Supreme Court, and the Illinois Supreme Court upheld the constitutionality of the statute, as it had in previous cases.

---

* "C denotes a page in the common law record on appeal and "R" denotes a page in the reports of proceedings. The complete record contains 19 volumes and roughly 10,000 pages.

REASONS FOR ALLOWANCE OF THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A DEATH PENALTY STATUTE WHICH VESTS UNBRIDLED DISCRETION IN THE PROSECUTORS AS TO WHO SHALL BE SUBJECT TO THE DEATH PENALTY VIOLATES THE EIGHTH AMENDMENT AND TO RESOLVE THE INSOLUBLE CONFLICT IN THE ILLINOIS SUPREME COURT WHICH WOULD SO HOLD BUT FOR ITS UNIQUE APPLICATION OF STARE DECISIS.

After a conviction for murder, a death penalty hearing in Illinois can be held only "[w]here requested by the State." Ill. Rev. Stat., 1979, Chapter 38, Section 9-1(d). The Supreme Court of Illinois has recognized that this statutory language places the decision on whether to convene a death hearing solely and squarely in the hands of the Illinois prosecutors. People ex rel. Carey v. Cousins, 77 Ill.2d 531, 397 N.E.2d 809 (1979). No other jurisdiction grants such authority on what is basically a judicial issue to the executive branch of the government.

Four of the seven Justices now sitting on the Supreme Court of Illinois have stated that the Illinois statute violates the Eighth Amendment. See People v. Lewis, 88 Ill.2d 129, 430 N.E.2d 1346 (1981).

In the Cousins case, three Justices -- Ryan, Clark, and Goldenhersh -- joined in a dissent. All three opined that giving the Illinois prosecutor the crucial decision, without any guiding standard, as to who shall be spared from the ultimate penalty, violated the Fighth Amendment. A fourth, Mr. Justice Simon, adopted this position in Lewis and has adhered to it in subsequent cases. Although the three Cousins dissenters reaffirmed their views in Lewis, each refused to join Justice Simon for reasons ranging from stare decisis to reliance that this Court would review the case. People v. Lewis, 430 N.F.2d at 1364. (Chief Justice Goldenhersh and Justices Ryan and Clark, concurring).

The hesitancy of the Illinois Supreme Court cannot hide the conclusion that the statute is unconstitutional in light of the

decisions of this Court. In Gregg v. Georgia, 428 U.S. 153, 188, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), this Court stated that because of the uniqueness of the death penalty, it cannot be imposed under procedures that create "a substantial risk that it would be inflicted in an arbitrary and capricious manner." Any discretion afforded on the life or death decision "must be suitably directed and limited so as to minimize the risk of the wholly arbitrary and capricious action." 428 U.S. at 189.

The discretion granted Illinois prosecutors to decide whether to convene a death penalty hearing is completely unfettered. The failure to "suitably direct" the prosecutor's post-trial discretion creates the same problem raised by a failure to "suitably direct" the sentencing body's discretion. Justices Marshall and Brennan recognized this problem in the Illinois statute in a dissent from the denial of certiorari in Eddmonds v. Illinois, 36 Cr.L. Rep. 4031 (No. 83-6832, October 10, 1984):

> The Illinois scheme differs from schemes this Court has approved in that capital sentencing proceedings in Illinois do not inexorably follow conviction for a crime punishable by death. Instead, the prosecutor has the authority -- and the duty -- to narrow down the class of convicted defendants. Yet the Illinois statute does not set any standards to guide that decision. Such unguided discretion cannot help but produce the sort of arbitrary, capricious, and discriminatory application of the death penalty that is simply intolerable under Furman v. Georgia, 408 U.S. 238 (1972). Because the prosecutor has no standards to guide his postconviction decision the Illinois scheme eliminates any "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Id, at 313 (White, J., concurring).
>
> The potential for arbitrariness in the imposition of the death penalty is further exacerbated because the discretion to initiate sentencing proceedings is not vested in one individual, but in the State's Attorneys of each of the State's 102 counties. Each of these 102 individuals, subject to the different political pressures of his own constituency, can establish his own policy -- or no policy at all -- on how to narrow the group of individuals convicted of crimes punishable by death, and in this endeavor he is not aided by any legislatively imposed standard or limited by any legislatively imposed constraint. People ex rel. Carey v. Cousins, 77 Ill.2d 531, 557-558, 397 N.E.2d 809, 822 (1979) (Ryan, J., dissenting);

see People v. Lewis, 88 Ill.2d 129, 192, 430 N.E.2d 1346, 1376-1377 (1981) (Simon, J., dissenting). In such a system, there will often be no rational distinction between an individual who receives the death penalty and one who does not.
36 Cr.L. Rep. 4031-4032

The application of the death penalty in Illinois has depended upon, and will always depend upon, the unguided, personal predilection of each Illinois prosecutor. Nothing in the statute even indicates that this should not be so. Nothing directs these State's Attorneys to base their judgment on the listed aggravating factors, or on any mitigating factors. To the contrary, the unambiguous language of Section 9-1(d), that a separate sentencing hearing shall be held simply "where requested by the State," manifests a legislative intent to leave this decision totally to the absolute discretion of the prosecutor. The statute cannot withstand the critical review of this Court and certiorari in this case should therefore be granted.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A DEATH PENALTY STATUTE WHICH PLACES THE BURDEN ON THE DEFENDANT TO PROVE A DEATH SENTENCE INAPPROPRIATE AND WHICH MAKES A DEATH SENTENCE MANDATORY IF THIS BURDEN IS NOT MET IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS.

Imposition of the death penalty under the Illinois statute, as under death penalty statutes in many other states, requires a preliminary determination of the existence of one or more enumerated aggravating factors and, once a defendant is thereby found eligible, an evaluation of evidence in aggravation and mitigation. Ill. Rev. Stat., 1979, Chapter 38, Sections 9-1(b), (g), and (h). The Illinois statute then provides:

> If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.
> Unless the jury unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence the court shall sentence the defendant to a term of imprisonment...
> Ill. Rev. Stat., 1979, Ch.38, Sec. 9-1 (g).

The Illinois death penalty statute thus creates a rebuttable presumption at the second phase of the sentencing hearing that death is the appropriate punishment. The defendant is assigned the burden of adducing "mitigating factors sufficient to preclude the imposition" of that punishment. Construing this language, the Illinois Supreme Court has held that if the defendant fails to meet this burden, imposition of the death penalty is mandatory. People v. Owens, 102 Ill.2d 88, 113-114, 464 N.E.2d 261, 273 (1984).

The Illinois statute violates the Eighth and Fourteenth Amendments by requiring "defendants to bear the risk of nonpersuasion as to the existence of [sufficient] mitigating circumstances in capital cases." Lockett v. Ohio, 438 U.S. 586, 609, 98 S.Ct. 2954, 57 L.Ed.2d 973, 992-993 (1978) (n. 16).[1] Justice Marshall recognized this problem in the Illinois statute in an opinion respecting the denial of certiorari in Jones v. Illinois, ___ U.S. ___, 104 S.Ct. 287, 78 L.Ed.2d 264 (1983):

> Given the wording of the Illinois death penalty statute and the trial court's instructions in this case, I am not convinced that petitioner's sentencing jury balanced mitigating factors and aggravating circumstances in the manner required by this Court in Lockett v. Ohio and Eddings v. Oklahoma. Under [the] Illinois statute, once a sentencing jury finds a statutorily-defined aggravating factor to exist, the jury proceeds to consider aggravating and mitigating factors. "If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death." At the sentencing trial in this case, the trial judge instructed the jury on how to evaluate mitigating evidence: "[Y]ou go out and determine whether or not this evidence has taken away the [aggravating] factors, mitigated the factors so that you might say no, we don't want to vote for the death penalty." Notwithstanding other portions of the trial court's instructions, this instruction coupled with the Illinois statute's ambiguous reference to "preclud[ing] the imposition of the

[1] In Lockett, this Honorable Court specifically left open the question of whether the Ohio death penalty statute was unconstitutional for the same reason.

> death sentence" may well have led the sentencing jury to conduct its deliberation under the assumption that petitioner had the burden of proving that the death penalty was inappropriate in his particular case. Since I do not understand this Court's precedents to permit the placing of such burden on a defendant, I would grant the petition.
>
> 78 L.Ed.2d at 264-65 (citations omitted)

This Court's precedents have clearly established that a capital sentencing procedure which interferes with the determination of whether death is an "appropriate punishment in a specific case" is unconstitutional. Lockett, supra, 438 U.S. at 601. See also Maxwell v. Pennsylvania, 36 Cr. L.Rep. 4064 (No. 84-5350, October 29, 1984), Marshall J., dissenting from denial of certiorari, Brennan, J. concurring; Cf. Smith v. North Carolina, 459 U.S. 1056 (1982), Stevens, J., opinion respecting denial of certiorari. Statutes requiring mandatory death sentences are unconstitutional. Roberts v. Louisiana, 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Statutes which prohibit consideration of relevant mitigating factors are also unconstitutional. Lockett v. Ohio; See also Eddings v. Oklahoma 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). A death penalty statute which places the risk of nonpersuasion on the defendant interferes with the sentencer's role in an equally improper manner, albeit more subtly, because it also creates the undue chance that a death sentence will be imposed where it is not appropriate.

The Court has observed that the allocation of a burden of proof artificially enhances the likelihood of error against the party who bears the burden. Speiser v. Randall, 357 U.S. 513, 525-526, 78 S.Ct. 1332, 2 L.Ed.2d 1460, 1472-1473 (1958). See also C. McCormick, Handbook of the Law of Evidence, Sec. 341 at 798-99 (2d Ed., E. Cleary 1972). Therefore, "[where] one party has at stake an interest of transcending value -- as a criminal defendant has liberty -- this margin of error is reduced as to him by the process of placing on the other party the burden... of

proof.." Speiser, supra. This reflects society's judgment that it is significantly worse for an innocent man to be found guilty than for a guilty man to go free. McCormick on Evidence, supra. Thus in a death penalty proceeding, there can be no question that the burden of proof, if any, must be placed on the prosecution rather than the defendant. [2]

Lockett, Eddings, Woodson and Roberts establish that capital punishment may be imposed only where "appropriate". This requirement may not be circumvented by means of statutes which establish a mandatory death penalty or by means of laws which prevent consideration of relevant mitigating evidence. Similarly, this Court should not allow the need for reliability in the imposition of capital punishment to be circumvented by a statute which places the burden of proof and risk of error on the defendant. "The power to create presumptions is not a means of escape from constitutional restrictions." Speiser, supra, citing Bailey v. Alabama, 219 U.S. 219, 239, 31 S.Ct. 145, 55 L.Ed. 191, 200 (1911).

For these reasons, this Honorable Court should grant certiorari in order to review the statute under which the petitioner was sentenced to death.

---

[2] Several states in fact require the prosecution to prove beyond a reasonable doubt that death is an appropriate punishment in order to impose that punishment. State v. Wood, 648 P.2d 71, 83-85 (Utah 1982). See Smith v. North Carolina, 459 U.S. 1056 (1982) Stevens, J., opinion respecting denial of certiorari. Under the Illinois statute, the jury is never required to find, by any standard of proof, that death is the appropriate punishment.

CONCLUSION

For the reasons stated in Points I and II above, this Honorable Court should grant the writ of certiorari to review the decision of the Supreme Court of Illinois.

Respectfully submitted,

STEVEN CLARK
Deputy Defender

ALAN D. GOLDBERG
Assistant Appellate Defender
Office of the State Appellate Defender
109 North Dearborn Street-8th Floor
Chicago, Illinois 60602
(312) 793-5472

COUNSEL FOR PETITIONER

Of Counsel:
MICHAEL J. PELLETIER
Assistant Appellate Defender.

APPENDIX A

Opinion Of Illinois Supreme Court

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ILLINOIS

(No. 53212.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. JOHN WAYNE GACY, Appellant.

Opinion filed June 6, 1984.—Rehearing denied September 28, 1984.

1. CRIMINAL LAW—*only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause in reviewing a complaint for a search warrant.* In reviewing the sufficiency of a complaint for a search warrant, courts are guided by the principle that only the probability, and not a *prima facie* showing, of criminal activity is the standard of probable cause. (Page 21.)

2. CRIMINAL LAW—*affidavits of probable cause for issuance of a search warrant are tested by less rigorous standards than the admissibility of evidence at trial.* Affidavits of probable cause for the issuance of a search warrant are tested by much less rigorous standards than those governing the admissibility of evidence at trial. (Page 21.)

3. CRIMINAL LAW—*magistrates assessing probable cause for issuance of a search warrant are not confined by restrictions on the use of common sense.* In judging probable cause for the issu-

ance of a search warrant, magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense. (Page 21.)

4. CRIMINAL LAW—*a magistrate's determination of probable cause should be paid great deference by reviewing courts.* A magistrate's determination of probable cause should be paid great deference by reviewing courts. (Page 21.)

5. CRIMINAL LAW—*a complaint for a search warrant must be considered as a whole in determining whether it adequately establishes a fair probability that evidence of a crime will be found.* The sufficiency of a complaint for a search warrant does not rest on whether each segment is complete in itself, but on whether the complaint, considered as a whole, adequately establishes that there is a fair probability that evidence of a crime will be found in a particular place. (Page 22.)

6. CRIMINAL LAW—*when a complaint for a search warrant in connection with the disappearance of a youth is not defective for failure to specify how the suspect whose house and person are to be searched was identified.* A complaint for a search warrant in connection with the disappearance of a 15-year-old boy is not defective for failure to specify how the suspect, whose home and person to be searched, was identified where the complaint recites he missing youth was last seen in a drugstore by a fellow ee and the youth's mother, that he stated he was going to efly to speak with the suspect, and that he never re- ce a common sense reading of the complaint would indi- he identifying information was received from the fellow d the mother, and since a judge ordering a warrant to propriately consider the fact that the mother of a would not be likely to supply misinformation to po- her son. (Pp. 19-23.)

LAW—*prior arrests and convictions of a suspect nsidered under certain circumstances in deter- able cause exists.* It is proper, under certain sider prior arrests and convictions of a sus- ther probable cause exists. (Page 23.)

—*when a complaint for a search warrant report is properly construed to mean on the date the report was made.* A in connection with the disappear- is not fatally defective for failure to informants made their observations,

and is properly construed to mean that the youth was last seen on the date the investigating officer received his information, rather than on some previous date, where the affidavit states the date on which the missing-person report was made and recites that both a fellow employee and the mother of the youth were present in a drugstore when the youth stated he was leaving briefly to talk with the suspect and would be right back, but never returned, since a common sense reading of such a complaint indicates that the officer received the information while investigating a missing-person report on the date in question. (Pp. 23-24.)

9. CRIMINAL LAW—*when a search warrant adequately describes items of clothing so that it cannot be said to be invalid as authorizing a general search.* A search warrant adequately describes particular items of clothing to be seized so that it cannot be said to be invalid as authorizing a general search where it describes the items as "Light blue down jacket and hood, tan colored Levi Pants—Brown wedge type suede shoes—lace type—Brown leather wallet—Levi T-Shirt," since such a warrant describes the color, style and even the type of material used in each article. (Pp. 24-25.)

10. CRIMINAL LAW—*a television set is not seized where photographed during a search of a residence pursuant to a valid warrant.* A television cannot be said to have been seized where it is photographed by police during a search of a residence pursuant to a valid warrant. (Page 25.)

11. CRIMINAL LAW—*when police do not act improperly in seizing items in plain view that are not named in a warrant for the search of a suspect sex offender's home in connection with the disappearance of a youth.* Where police officers have a valid warrant to seize identified articles at the residence of a known sex offender who is a suspect in the disappearance of a 15-year-old boy, they do not act improperly in seizing a film receipt from the drugstore where the youth was last seen and a ring from a local high school, where these items are in plain view. (Pp. 25-26.)

12. CRIMINAL LAW—*evidence adduced at a suppression hearing may not be used to bolster the sufficiency of a complaint for a search warrant.* Evidence adduced at a suppression hearing may not be used to bolster the sufficiency of a complaint for a search warrant. (Page 27.)

13. CRIMINAL LAW—*when a trial court finding that a complaint to search a residence for the remains of a missing youth is valid will not be overturned on appeal—motions to suppress.* A

trial court finding that a complaint to search a residence for the body of a missing youth is valid, and that court's denial of a motion to suppress evidence seized pursuant to the warrant will not be overturned on appeal where the owner of the residence is a known sex offender who is the individual the missing youth was going to see when he was last seen alive at a drugstore and where the complaint alleges that a film receipt from that drugstore has already been found at the residence and, in addition, that one of the police officers executing a prior search warrant smelled the odor of a putrifying human body. (Pp. 27-28.)

14. CRIMINAL LAW—*the doctrine of plain error should be invoked where the evidence is closely balanced or the accused is denied a fair trial.* Criteria for determining whether the doctrine of plain error should be invoked are whether the evidence is closely balanced or whether the error is of such a magnitude that the accused is denied a fair and impartial trial. (Page 28.)

15. CRIMINAL LAW—*a contention that a confession is not the product of a rational mind or free will cannot properly be raised where not made at trial.* A defendant's claim on appeal to the supreme court that his confession was not the product of a rational mind or free will cannot properly be reviewed where the defendant's failure to assert this objection at trial precluded the trial court from making a record on this point. (Pp. 28-29.)

16. CRIMINAL LAW—*counsel's advice to confess does not show incompetence where guilt of multiple murders is apparent and insanity appears to be the best defense.* Claims that defendant's attorneys encouraged him to confess cannot be said to demonstrate incompetence of counsel where the defendant's guilt of multiple murders is apparent and insanity appears to be the most realistic defense under the circumstances. (Pp. 29-30.)

17. CRIMINAL LAW—*a trial court which sufficiently questions a venireman as to his knowledge of a case does not commit reversible error in refusing a request for further specific questions on this topic.* A trial court which has questioned a prospective juror sufficiently as to the sources from which he has learned of the instant case and whether he has formed an opinion from those sources and from persons who may have expressed opinions about the case does not commit reversible error in refusing the defendant's request to ask further specific questions on this topic. (Pp. 30-31.)

18. CRIMINAL LAW—*a defendant cannot successfully complain as to the questioning of veniremen where he has an*

opportunity to tender specific questions for them and fails to do so. A defendant cannot successfully complain on appeal that the questioning of veniremen has not been adequate where he has an opportunity at trial to tender specific questions for the trial judge to ask the veniremen and he fails to do so. (Page 31.)

19. CRIMINAL LAW—*the manner of questioning a venireman does not constitute error where he is excused for cause.* The manner in which a venireman is questioned will not be held to constitute error where he is excused for cause. (Page 31.)

20. CRIMINAL LAW—*failure to sequester the jury prior to trial does not constitute reversible error where sequestration is not requested, no motion for a mistrial on this basis is made, and no prejudice is shown.* Failure to sequester the jury between the time of its selection and trial will not be found on appeal to constitute reversible error where the defendant neither moves to sequester the jury over this time nor asks for a mistrial on the basis of failure to sequester, and where it is not shown that any prejudicial media coverage occurred during the time in question. (Page 35.)

21. CRIMINAL LAW—*the press and public have a right of access to criminal trials, but this right is not without limits.* The press and general public have a constitutional right of access to criminal trials, but this right is not without limits. (Page 36.)

22. CRIMINAL LAW—*the sixth amendment guarantees the accused a right to a public trial, but does not give a right to a private trial.* The sixth amendment guarantees the accused the right to a public trial, but it does not give a right to a private trial. (Page 36.)

23. CRIMINAL LAW—*a trial court's failure to close voir dire proceedings to the public will not be held to be error on the bare assertion that prospective jurors are not being fully candid.* A trial court's failure to close voir dire proceedings to the press and public will not be held to be erroneous on the bare assertion that prospective jurors are not being fully candid. (Page 36.)

24. CRIMINAL LAW—*voir dire conducted by the trial judge rather than the attorneys does not deny due process or the right to jury trial where the opportunity to propose questions is given.* The fact that *voir dire* is conducted by the trial judge rather than by the attorneys does not deny a defendant due process of law or the right to a fair and impartial jury where the circuit court permits the attorneys to suggest additional questions when they feel the court's questioning is inadequate. (Pp. 36-37.)

25. CRIMINAL LAW—*a defendant who does not exhaust all his*

peremptory challenges cannot successfully contend that the number allowed by statute is insufficient. A defendant who does not exhaust the 20 peremptory challenges allowed by statute (Ill. Rev. Stat. 1977, ch. 38, par. 115—4(e)) cannot successfully complain that he should have been allowed more than this number. (Page 37.)

26. CRIMINAL LAW—*the examination of veniremen concerning the death penalty will not be held to result in an unrepresentative jury or one which is biased in favor of the prosecution.* The examination of prospective jurors on their attitudes towards the death penalty will not be held to result in the selection of a jury which fails to represent a fair cross-section of the community or which is biased in favor of the prosecution. (Pp. 37-38.)

27. CRIMINAL LAW—*the right to a jury trial has been interpreted as the right to an impartial jury selected from a representative cross-section of the community.* The right to a jury trial has been interpreted by the United States Supreme Court as the right to an impartial jury selected from a representative cross-section of the community. (Page 43.)

28. CRIMINAL LAW—*a defendant has no right to be tried in the county most favorable to him and his theory of defense.* A defendant has no right to be tried in the county which is most likely to be favorably disposed to him and his theory of defense, and, just as the People may not select a jury which is predisposed on a pertinent issue that will arise at trial, the defendant may not seek out a county in which prospective jurors will most likely be predisposed on the defenses which the defendant will raise. (Page 43.)

29. CRIMINAL LAW—*when a trial court which grants a change of venue does not err in refusing to also provide $38,000 for a further publicity survey in counties other than the original one.* A trial court which grants a change of venue out of the county in which the multiple murders charged have occurred does not err in refusing to provide $38,000 in additional funds for a publicity survey and analysis in counties other than that in which the charge was originally brought where publicity surveys that have already been performed indicate that the impact of media coverage has been the greatest in the county of the offenses and that, although publicity did occur throughout Illinois and throughout the nation, it was far greater in the county of the offenses than elsewhere. (Pp. 38-44.)

30. CRIMINAL LAW—*where there is little conflict in the evi-*

dence as to sanity, the issue presented is what inference to draw, and this is a question of fact for the fact finder. Where there is little conflict in the evidence on the issue of sanity, the question presented is what inference may appropriately be drawn therefrom, and such a record presents a question of fact to be determined by the fact finder. (Page 69.)

31. CRIMINAL LAW—*a fact finder's decision as to sanity will not be reversed unless a reasonable doubt as to sanity is raised.* A fact finder's decision on the issue of sanity will not be reversed unless the determination is so improbable or unsatisfactory as to raise a reasonable doubt as to the defendant's sanity. (Page 69.)

32. CRIMINAL LAW—*where a trial court record does not require the drawing of the inference that the defendant was insane, the jury's rejection of the insanity defense will not be reversed.* A jury's rejection of the insanity defense for a defendant charged with 33 murders, deviate sexual assault and indecent liberties will not be reversed where there is little conflict in the evidence on the question of sanity, thereby presenting the issue of what inference should be drawn by the fact finder, and where the evidentiary record is such that the jury is not required to draw the inference that the defendant was insane. (Page 69.)

33. CRIMINAL LAW—*a reviewing court need not rule on alleged error in refusing to allow defense psychiatrists to repeat the defendant's statements to them where their nonverbatim versions of his statements are admitted in evidence.* A reviewing court need not consider any alleged error in a trial court's ruling that expert witnesses for the defense on the issue of sanity would not be allowed to recount statements made to them by the defendant, while experts testifying for the State would be allowed to do so, where, because the defendant's experts are not precluded from explaining the basis for their conclusions on the issue of sanity, as a practical matter their nonverbatim versions of the defendant's statements are in fact admitted into evidence. (Pp. 69-73.)

34. CRIMINAL LAW—*a defendant who seeks the introduction of his statements to prosecution psychiatrists cannot successfully claim denial of the privilege against self-incrimination.* A defendant cannot successfully contend on appeal that he was denied his fifth amendment right against self-incrimination by disclosure to the jury of his statements to the People's experts where it is the defendant himself who seeks to introduce these statements into evidence. (Pp. 73-74.)

35. CRIMINAL LAW—*where the only question at trial is the*

insanity defense, there is no prejudice in failing to instruct the jury to limit its consideration of certain evidence to this issue. Where there is no question at trial other than the insanity defense, there is no prejudice in failing to instruct the jury to limit its consideration of certain evidence to this issue. (Page 74.)

36. CRIMINAL LAW—*waiver occurs where a defendant fails to object to the use of statements, stipulates to it, and relies on the statements at the death penalty hearing.* A defendant waives any objection to the use of statements which he has made to the People's psychiatrist where he fails to object to their use, stipulates to it, and relies on the statements at his death penalty hearing. (Page 74.)

37. CRIMINAL LAW—*a reviewing court will not permit a defendant to inject error into his own case by the review of issues which he has waived.* A reviewing court will not permit a defendant to inject error into his own case by the review of issues which he has waived. (Page 74.)

38. CRIMINAL LAW—*evidence of a defendant's fitness for trial is not necessarily relevant to an insanity defense, although there may be instances where such evidence is relevant.* Evidence as to a defendant's fitness to stand trial is not necessarily relevant to an insanity defense, although there may be instances where such evidence is relevant. (Page 76.)

39. CRIMINAL LAW—*where the insanity defense is the only issue at trial, any error in the introduction of testimony on fitness is harmless if the difference between fitness and sanity is explained to the jury.* When the insanity defense is the only issue at trial, any error in permitting certain experts to testify that they have found the defendant fit to stand trial is harmless where in each instance the witness also explains the difference between fitness to stand trial and the insanity defense. (Pp. 75-76.)

40. CRIMINAL LAW—*any error in restricting testimony as to substance abuse offered to support the defense of insanity is harmless where objections are sustained after the testimony is given and there is other evidence of substance abuse.* Any error in restricting defense counsel's examination of experts concerning substance abuse in order to support the defense of insanity is harmless where the objections to the questions are sustained after the testimony is given and where there is other evidence of substance abuse. (Page 76.)

41. CRIMINAL LAW—*questions as to whether a psychologist has diagnosed anyone as a "borderline" personality type in the past 28 years are improper where this category has been scientifically recognized only recently.* Prosecution objections to defense questions as to whether a psychologist has diagnosed anyone as "borderline" in the previous 28 years are properly sustained where "borderline personality disorder" as a personality designation is approved and adopted by the American Psychiatric Association while the case is being tried. (Pp. 76-77.)

42. EVIDENCE—*it is not improper for a trial court to preclude the asking of a question which might require a variety of answers depending on its interpretation.* It is not improper for a trial court to preclude the asking of a question which might require a variety of answers depending on how it is interpreted. (Page 77.)

43. EVIDENCE—*the fact that a Rorschach test is the only test used by an expert in determining whether there is nonorganic brain damage goes to weight, rather than admissibility, of his testimony—insanity.* The fact that a Rorschach test is the only test given by an expert in determining whether a defendant who has raised the insanity defense has nonorganic, as opposed to organic, brain damage goes to the weight, rather than the admissibility, of his testimony on this issue. (Pp. 77-78.)

44. CRIMINAL LAW—*defense claims of improper impeachment of an expert need not be considered on appeal where not damaging to defendant's case and a cautionary instruction is given.* Defense claims that the People improperly impeached an expert need not be considered on appeal where the testimony in question was not damaging to the defendant's case and, in addition, a cautionary instruction was given. (Pp. 78-79.)

45. CRIMINAL LAW—*testimony as to the extent to which an expert's opinions as to sanity have been supported by juries is improper, but may be harmless error where objection is sustained.* Testimony as to the extent to which an expert's opinions concerning sanity or insanity of defendants have been agreed to by juries is improper, but may be harmless error where an objection is sustained. (Pp. 79-82.)

46. CRIMINAL LAW—*the prosecution has the right to cross-examine an expert witness as to bias, prejudice or interest in the outcome.* The prosecution has the right to cross-examine an expert witness as to his bias, prejudice or interest in the outcome of the suit. (Page 82.)

47. CRIMINAL LAW—*when any impropriety in prosecution questions as to whether a defense expert on sanity has sought press interviews is not reversible error.* Where an expert has testified for the defense concerning the issue of insanity, any impropriety in prosecution questions as to whether he has sought press interviews is not reversible error as prejudicial where an objection to this line of questioning is sustained and the jury is instructed to disregard any remarks concerning the matter. (Page 82.)

48. CRIMINAL LAW—*the prosecution is entitled to argue that evidence establishes that the defendant has concocted a multiple-personality defect to support his insanity defense.* The prosecution is entitled to argue that the evidence establishes that the defendant has concocted a multiple-personality defect and is attempting to use it to avoid responsibility for his crimes through the insanity defense. (Pp. 82-83.)

49. CRIMINAL LAW—*when there is no denial of the right to counsel in argument that defendant's visits to his lawyers prior to displaying a multiple-personality defect show he is faking an insanity defense.* There is no error in the prosecution's asking the jury to draw the inference that the defendant's consultation with his attorneys prior to making statements to police concerning multiple personalities supports the prosecution's theory that the defendant is attempting to fake an insanity defense. (Pp. 83-84.)

50. CRIMINAL LAW—*the prosecution may properly rebut defense assertions that murder victims were all homosexual prostitutes.* The prosecution may properly rebut defense assertions that murder victims were all homosexual prostitutes. (Page 85.)

51. EVIDENCE—*the effect of prejudicial or inflammatory evidence depends upon the circumstances of the case.* The effect of prejudicial or inflammatory evidence depends upon the circumstances of the case. (Page 86.)

52. CRIMINAL LAW—*when inflammatory references to victims' families is not prejudicial in a trial for sadistic, sex-related multiple murders.* Prosecutorial references to the families and personal lives of victims do not constitute reversible error where revulsion in the jurors has already been created by the defendant's guilt of a record-breaking number of murders and the proof of his sadistic torture of his victims and the sex offenses committed upon them. (Pp. 84-87.)

53. CRIMINAL LAW—*the jury cannot be said to be misled by a single misstatement of the insanity test when the prosecutor repeatedly states the proper test.* A jury cannot be said to be misled by a single prosecutorial misstatement of the insanity test where the prosecutor repeatedly does state the proper test. (Page 87.)

54. CRIMINAL LAW—*no error will be found based on complaints about prosecutorial argument that go to its persuasiveness rather than to its propriety.* No error will be found based on complaints about prosecutorial argument that go to its persuasiveness rather than to its propriety. (Pp. 87-88.)

55. CRIMINAL LAW—*the prosecutor may argue for such inferences as he believes are proper from the testimony, just as defense counsel is free to argue the evidence supports the conclusions suggested by him.* The prosecutor does not transcend the bounds of proper argument by drawing such inferences as he believes are proper from the testimony, just as defense counsel is free to argue that the evidence does not support the prosecutor's conclusions, but rather supports the conclusions drawn by the defense. (Page 88.)

56. CRIMINAL LAW—*prosecutorial argument that is not objected to by the defense at trial is properly considered waived.* Prosecutorial argument that is not objected to by the defendant at trial is properly considered waived. (Page 88.)

57. CRIMINAL LAW—*when a trial court does not err in refusing to instruct the jury that it is not bound by medical labels, definitions or conclusions as to what is a mental disease.* A trial court in a murder case in which the insanity defense is raised does not err in refusing a defendant's proffered instruction that the jury is "not bound by medical labels, definitions, or conclusions as to what is or is not a mental disease" where the jury has been properly instructed concerning the credibility of the witnesses and the insanity defense, and where the prosecution has not argued, as contended by the defendant, that, in order to be a mental disease, the disease must be listed in the manual approved by the American Psychiatric Association. (Pp. 89-90.)

58. CRIMINAL LAW—*when a defendant is not denied effective assistance of counsel by his attorney's remarks that are claimed to indicate four psychiatrists will find him insane when only two actually do so.* A defendant's contentions that he was denied effective assistance of counsel must be rejected where the defendant claims that his counsel stated that four psychiatrists would find him insane, when in fact only two actually do so, but where the comments at issue could be interpreted merely to imply that four psychiatrists will testify concerning the issue of sanity, rather than stating that four will find the defendant insane, and where, in any event, it is unlikely that the jury would have remembered the comment regarding four psychiatrists in the opening state-

ment after hearing a month of complex and conflicting psychiatric testimony. (Pp. 90-91.)

59. CRIMINAL LAW—*an instruction to limit certain testimony to the issue of the insanity defense is not necessary where insanity is the only issue and there is no question of guilt—competence of counsel.* Defense counsel cannot be said to have been incompetent for failing to tender an instruction seeking to limit certain testimony to the issue of the insanity defense under circumstances where the insanity defense is the only issue and there is no question that the defendant actually committed the murders charged. (Page 91.)

60. CRIMINAL LAW—*when it cannot be said that one of 33 murders charged has not been proved beyond a reasonable doubt.* Where a defendant is charged with murdering 33 individuals in sex-related offenses, it cannot be said that the murder of one of them has not been proved beyond a reasonable doubt where the defendant's crimes indicate a pattern of homosexual assaults on young men and the victim is a homosexual, where the body reveals that the murder may have been sex related, where the body is found in a river where the defendant confessed he threw five bodies of his victims, and where the defendant has also confessed to picking up one of those five victims in the vicinity of the residence of this particular victim. (Pp. 92-93.)

61. CRIMINAL LAW—*the validity of convictions and sentences for indecent liberties and deviate sexual assault committed on the same victim need not be addressed where no sentences are imposed for these convictions.* A defendant's assertions that he was not proved guilty beyond a reasonable doubt of committing indecent liberties and deviate sexual assault on a particular victim and also that he cannot simultaneously be convicted of these two offenses need not be addressed on an appeal where no sentences are imposed on these convictions. (Pp. 93-94.)

62. CRIMINAL LAW—*when the alleged impropriety of lesser convictions cannot be said to have influenced a jury in sentencing a defendant to death for 12 of the 33 murders he committed.* Any alleged impropriety in convictions for indecent liberties and deviate sexual assault cannot be said to have influenced a jury in sentencing the defendant for 12 of the 33 murders he committed where, even in the absence of the challenged convictions, the jury would have been exposed to the defendant's confession which detailed the evidence complained of and where, considering the enormous amount of evidence establishing aggravating factors

against the defendant, it cannot be said that the challenged convictions, even if improper, deprived the defendant of a fair death penalty hearing. (Pp. 93-94.)

63. CRIMINAL LAW—*when defense counsel's strategy to avoid sequestering the jury prior to a death penalty hearing and to stipulate to the admission there of all the trial evidence does not show incompetence.* Where a defendant has been convicted of 33 sex-related murders, 12 of which qualify for the death penalty, defense counsel cannot be said to have been incompetent by virtue of his plan to proceed directly to the death penalty hearing after trial, rather than seeking to sequester the jury (which might have antagonized them because of the inconvenience) and by his decision to stipulate to the admission at the sentencing hearing of all the evidence presented at trial, relying at the sentencing hearing on a plea for mercy. (Pp. 94-95.)

64. CRIMINAL LAW—*defense counsel does not show incompetence by stipulating that evidence admitted at trial on the issue of insanity be admitted at the death sentencing hearing to show extreme mental or emotional disturbance.* Defense counsel cannot be said to be incompetent by virtue of his decision to stipulate that evidence admitted at trial on the issue of the insanity defense be considered admitted at the death penalty hearing on the issue of the mitigating factor of extreme mental or emotional disturbance, since it cannot be said that it is incompetent for trial counsel to make such a choice and possibly avoid antagonizing the jurors by subjecting them to psychiatric testimony which may have sounded repetitive to them. (Page 95.)

65. CRIMINAL LAW—*alleged incompetence of counsel arising from a matter of trial tactics or strategy will not support a claim of ineffective representation.* Alleged incompetence of counsel arising from a matter of trial tactics or strategy will not support a claim of ineffective representation. (Page 95.)

66. CRIMINAL LAW—*defense counsel's decision to stipulate to the admission at a death sentencing hearing of all the evidence admitted at trial and to argue mitigating factors on this basis cannot be said to show incompetence.* Defense counsel's decision at a death penalty hearing to stipulate to the admission of all the evidence presented at trial and to argue mitigating factors on this basis cannot be said to show incompetence, since counsel should not be faulted for the tactical choice not to repeat evidence of such mitigating factors as family relationships and civic work which were already presented at trial. (Pp. 95-96.)

67. CRIMINAL LAW—*defense counsel for a brutal multiple murderer cannot be said to have been incompetent because he chooses to argue against the death penalty itself rather than to try to establish mitigating factors sufficient to avoid the death penalty.* Trial counsel for a defendant convicted of 33 sex-related murders, 12 of which qualify for the death penalty, cannot be said to have been incompetent in his decision to argue against the death penalty itself (by proposing that it would be better to study the defendant than to have him executed in an act of revenge), rather than to try to argue that there are mitigating factors sufficient to avoid the death penalty. (Pp. 95-96.)

68. CRIMINAL LAW—*when a prosecutor's improper remark at a death penalty hearing that he does not want to pay the defendant's rent for the rest of his life does not constitute reversible error.* A prosecutor's remark at a death penalty hearing that he does not want to pay a multiple murderer's rent for the rest of his life is improper as injecting a "cost factor" and his personal belief into the jury's deliberations, but it does not constitute reversible error where, in the context in which it is made, it is merely a sarcastic assertion that life imprisonment is an inadequate punishment and where, although the trial court erred in failing to sustain an objection to this remark, defense counsel's statement: "let [the prosecutor] pull the switch" in making the objection may have led the trial court to decide that an objection made in that form should pass without further comment. (Pp. 96-97.)

69. CRIMINAL LAW—*prosecutorial insinuation that a defendant would kill again if sentenced to life imprisonment is not improper where defendant has been convicted of 33 murders and his prior imprisonment has failed to deter him from committing further crimes.* Prosecutorial insinuation that the defendant will kill again if sentenced to life imprisonment is not improper where the defendant has been convicted of 33 murders and his prior imprisonment has failed to deter him from committing further crimes. (Page 97.)

70. CRIMINAL LAW—*a prosecutor does not act improperly in arguing that the State is entitled to the death penalty because it has proved its case therefor, especially where any implication that a death sentence is mandatory is negated by jury instructions.* A prosecutor does not act improperly in arguing that the State has proved its case for the death penalty and is entitled to a decision in its favor, especially where any implication that a death sentence is mandatory is negated by jury instructions. (Pp. 97-98.)

71. CRIMINAL LAW—*a defendant who fails to object to prosecutorial argument at his death penalty hearing waives the issue on appeal.* A defendant who fails to object to prosecutorial argument at his death penalty hearing waives the issue on appeal. (Page 98.)

72. CRIMINAL LAW—*when an oral instruction which erroneously states the law as to jury unanimity cannot be said to constitute reversible error at a death penalty hearing.* An oral instruction to a death penalty jury which misstates the law by stating that the jurors may direct a sentence of imprisonment if they "unanimously conclude there are mitigating factors sufficient to preclude" the death penalty does not constitute reversible error where a correct instruction on this point is tendered in written form, and the jury is instructed correctly as to the law on this issue four separate times, so that it cannot be said that the jury was left with a mistaken interpretation of the law or that it was confused. (Pp. 98-100.)

73. CRIMINAL LAW—*a death sentencing jury may consider all the trial evidence in its deliberations, even in the absence of a stipulation.* A death sentencing jury, even in the absence of a stipulation, may consider all the trial evidence in its deliberations upon the death penalty. (Page 100.)

74. CRIMINAL LAW—*a defendant normally speaks through his attorney, who stands in the role of agent.* A defendant normally speaks through his attorney, who stands in the role of agent. (Page 100.)

75. CRIMINAL LAW—*a defendant who stands by without objection while his attorney proceeds directly to the death sentencing hearing after trial is deemed to have acquiesced in, and be bound by those actions.* A defendant who permits his attorney, in his presence and without objection, to immediately proceed to a sentencing hearing after the trial of a capital case is deemed to have acquiesced in, and to be bound by, those actions. (Pp. 100-01.)

76. CRIMINAL LAW—*the decision at sentencing in a capital case is a balancing process.* The decision at sentencing in a capital case is a balancing process. (Page 101.)

77. CRIMINAL LAW—*when evidence of a mental or emotional disturbance does not require a jury to withhold the death penalty in connection with multiple, homosexually related murders which involve sexual torture and physical abuse.* The fact that a defendant in a capital case presents evidence that he was suffering from a mental or emotional disturbance as a mitigating factor does not require a jury to refrain from imposing the death penalty for mul-

tiple, homosexually related murders which involve incidents of sexual torture and physical abuse. (Pp. 101-03.)

78. CRIMINAL LAW—*it is not necessary to impanel a second jury for a death penalty hearing to avoid confusion between the mitigating factor of extreme emotional or mental disturbance and an insanity defense.* The fact that a defendant has presented an insanity defense at his jury trial in a capital case does not require that a second jury be impaneled at the death sentencing hearing in order to avoid confusion with the mitigating factor of extreme emotional or mental disturbance (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(d)(2)). (Page 103.)

79. CRIMINAL LAW—*the mitigating factor of extreme mental or emotional disturbance does not limit a death sentencing jury to consideration of any other level of mental or emotional disturbance, since it may consider any mitigating factors.* The use of the term "extreme" in connection with the mitigating factor in the death penalty of extreme mental or emotional disturbance does not limit the jury's consideration to any specific level or mental or emotional disturbance, since the jury is permitted to consider any other facts or circumstances that provide reasons for imposing less than the death penalty. (Page 104.)

80. CRIMINAL LAW—*the prosecution is entitled to both open and close the arguments at a death penalty hearing, even if the defendant stipulates to a statutory aggravating factor.* The prosecution is entitled to both open and close the arguments at a death penalty hearing since, as the moving party, it is entitled to rebuttal argument (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(d)), and the fact that a defendant stipulates to a statutory aggravating factor which the prosecution would be required to prove beyond a reasonable doubt does not alter this result. (Page 105.)

81. CRIMINAL LAW—*a presentence report is not required in capital cases.* A presentence investigation report is not required in capital murder cases. (Page 106.)

82. CRIMINAL LAW—*defects in a presentence report may be waived.* Defects in a presentence report may be waived. (Page 107.)

83. CRIMINAL LAW—*when a defendant who receives sentences for both death and life imprisonment cannot successfully contend that he was prejudiced by the absence of a presentence report.* A defendant who receives sentences for both death and life imprisonment cannot successfully contend on appeal that he was prejudiced by the absence of the presentence report that is required in

noncapital but not in capital cases, where the examination of the history, background and mental state of the defendant is quite thorough at trial and the information derived therefrom substantially fulfills the statutory requirements of the presentence investigation report (Ill. Rev. Stat. 1979, ch. 38, par. 1005—3—2(a)), where it is stipulated that all evidence admitted at trial be admitted at the sentencing hearing, and where no objection is raised when the court proceeds immediately to sentencing on all the charges without the report. (Pp. 106-07.)

84. CRIMINAL LAW—*a defendant cannot successfully contend for the first time on appeal that he should have been allowed to proceed pro se at his motion for a new trial.* A defendant who contends for the first time on appeal that he should have been permitted to present his own arguments in support of a motion for a new trial must be held to have waived his right to personally argue that motion. (Pp. 107-08.)

85. CRIMINAL LAW—*a defendant's presence is not necessary for a correction of the record.* A defendant's presence is not necessary for a correction of the record. (Page 108.)

86. CRIMINAL LAW—*the question whether capital punishment deters murders such as those enumerated in the death penalty statute is a matter for the legislature rather than the courts.* The determination of whether capital punishment is a deterrent to certain types of murders, such as those enumerated in the Illinois death penalty statute, is an issue whose resolution properly rests with the legislature rather than the courts. (Pp. 109-10.)

SIMON, J., concurring in part and dissenting in part.

Appeal from the Circuit Court of Cook County, the Hon. Louis B. Garippo, Judge, presiding.

Steven Clark, Deputy Defender, and Michael J. Pelletier and Alan D. Goldberg, Assistant Appellate Defenders, of the Office of the State Appellate Defender, of Chicago (Ralph Ruebner, of counsel), for appellant.

Neil F Hartigan, Attorney General, of Springfield, and Richard M. Daley, State's Attorney, of Chicago (William J. Kunkle, Jr., Chief Deputy State's Attorney, and Michael E. Shabat, Joan S. Cherry, James S. Veldman and Kevin Sweeney, Assistant State's Attorneys, of counsel), for the

People.

David C. Sobelsohn and Linda E. Fisher, of Chicago, for *amici curiae* American Civil Liberties Union *et al.*

JUSTICE GOLDENHERSH delivered the opinion of the court:

In indictments returned in the circuit court of Cook County, defendant, John Wayne Gacy, was charged with 33 counts of murder, one count of deviate sexual assault, one count of indecent liberties with a child, and one count of aggravated kidnaping. The circuit court allowed defendant's motion that one trial be held on all pending indictments. Following a jury trial during which the charge of aggravated kidnaping was dismissed, defendant was found guilty on all of the other counts. In a hearing requested by the People concerning the 12 murders committed subsequent to the enactment of the death penalty provision of section 9—1 of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 9—1), the jury found that one or more of the factors set forth in section 9—1(d) existed, and found that there were no mitigating factors sufficient to preclude a sentence of death. Defendant was sentenced to death on 12 counts of murder and to terms of natural life on each of the remaining murder counts. The sentences were stayed (87 Ill. 2d R. 609(a)) pending appeal to this court (Ill. Const. 1970, art. VI, sec. 4(b); 87 Ill. 2d R. 603).

The testimony shows that on the evening of December 11, 1978, Robert Piest, a 15-year-old boy, worked at the Nisson Pharmacy in Des Plaines. His mother had driven to the pharmacy to pick him up after work and he told her that he was going to see a building contractor about a summer job and would be back in a few minutes. He was never again seen alive. Defendant was a building contractor and had spent much of the evening in the Nisson Pharmacy. At about the time Piest disappeared,

defendant's truck was seen outside the pharmacy. The Des Plaines police department suspected that defendant was involved in Piest's disappearance. The police learned that he had a record of sexually assaulting young men and had been convicted in Iowa for an assault on a teenage boy. A more detailed review of the facts surrounding the investigation and the issuance and execution of several search warrants will be set forth in the discussion of the issues.

In the course of the investigation defendant admitted that he had killed approximately 30 individuals, some buried in the crawl space under his home and five thrown into the Des Plaines River. Excavation of the crawl space and the area surrounding defendant's home recovered 29 bodies. In addition, four bodies were recovered from the Des Plaines and Illinois rivers, downstream from the place where defendant had told the police that he threw the bodies.

Defendant contends first that the circuit court erred in denying his motion to suppress the evidence seized as the result of the search warrant issued on December 13, 1978, and argues that both the complaint for the search warrant and the search warrant itself were defective. The complaint stated:

> "I, Joseph Kozenczak, Detective Lt. with the Des Plaines Police Dept. received information on Dec. 11, 1978 concerning the missing persons case report on Robert J. Piest M/W 15 DOB: March 1963 5'8, 140 lbs, brown hair and a slim build. During the course of my police investigation the following information was revealed, that Piest was last seen at 1920 Touhy Ave. in Des Plaines in Nisson Drugs where he works by Kim Byers a fellow employee. Byers stated that Piest approached her and said, 'Come watch the register; that contractor guy wants to talk to me, I'll be right back.' At which time Piest went outside of the store to meet with John W. Gacy. Mrs. Elizabeth Piest, the missing boy's mother was also in the store at this time and was waiting to pick her

son up from work. Prior to leaving the store her son requested that she wait a few minutes while he spoke to a subject about a Summer construction job. Mrs. Piest waited over twenty minutes in the store and then began looking for her son. Robert Piest left the store at approximately 2100 hrs. and has not been seen or heard from since.

On the date in question John W. Gacy was observed in the store at 1920 Touhy Ave. on two different occasions. Once at 6:00 P.M. and a second time at 9:00 P.M. at which time he stayed in the store until 9:50 P.M. which was the approximate time that the missing person Robert J. Piest disappeared from the store location. During the course of my investigation it was found that John W. Gacy is in fact a contractor and owner of same, which is under the name of PDM Construction Company, located at 8213 W. Summerdale, Norridge, Ill. which is his residence.

A one story ranch type house, brick structure with semi-circle drive in front and a driveway on the east side of the building. The property also contains an oversize brick garage in the rear of the property. Also included is a Black Van truck with 'PDM' painted on it along with a black pickup truck with 'PDM' on its side, also, a Mack 1979 Oldsmobile Illinois Lic. #PDM42, Vin: 3M69S9X106796.

During the course of my investigation, I learned that John W. Gacy was arrested and convicted in Waterloo, Iowa in 1968 for Sodomy and sentenced to 10 yrs. in prison. The Sodomy arrest involved 15 and 16 year old youths. In 1968 John W. Gacy was arrested for Conspiracy – Assault with attempt to commit Felony on 15 and 16 year old youths – CD3036939. Subject was also arrested on June 22, 1972 by the Northbrook, Ill. police Dept. Case #7204479 – Aggravated Battery and Reckless Conduct, which was a sex related offense."

The search warrant recited that probable cause had been established and it directed the police to:

"*** search John W. Gacy and 8213 W. Summerdale – Norridge, Ill. and the following described vehicles: and seize Light blue down jacket and hood, tan colored Levi Pants – Brown wedge type suede shoes – lace type – Brown leather wallet – Levi T-Shirt, along with hair samples, blood stained clothing and dried blood samples, along with the following three vehicles:

1) Black van truck with 'PDM' on side
2) Black pick up truck with 'PDM' on side
3) Black 1979 Oldsmobile Ill. Lic. 1978 'PDM 42'
Vin: 3m69S9X106796."

Defendant argues that the warrant failed to satisfy the "basis of knowledge" test of *Aguilar v. Texas* (1964), 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509, and failed to disclose sufficient facts to establish probable cause. In reviewing the sufficiency of the complaint we are guided by the Supreme Court's statement in *Spinelli v. United States* (1969), 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584, "that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, *Beck v. Ohio* [(1964), 379 U.S. 89, 96, 13 L. Ed. 2d 142, 147-48, 85 S. Ct. 223, 228]; that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, *McCray v. Illinois* [(1967), 386 U.S. 300, 311, 18 L. Ed. 2d 62, 70, 87 S. Ct. 1056, 1062]; that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, *United States v. Ventresca* [(1965), 380 U.S. 102, 108, 13 L. Ed. 2d 684, 688, 85 S. Ct. 741, 745]; and that their determination of probable cause should be paid great deference by reviewing courts, *Jones v. United States* [(1960), 362 U.S. 257, 270-71, 4 L. Ed. 2d 697, 708, 80 S. Ct. 725, 735-36]." (393 U.S. 410, 419, 21 L. Ed. 2d 637, 645, 89 S. Ct. 584, 590-91.) We are not concerned, as was the court in *Aguilar*, with the reliability of an unnamed informant because it is readily apparent from the affidavit from whom the hearsay information contained in the complaint was obtained. The judge to whom the complaint is submitted

must make a judgment whether probable cause existed, and the information furnished him "must provide the affiant's answer to the magistrate's hypothetical question, 'What makes you think that the defendant committed the offense charged?' " *Jaben v. United States* (1965), 381 U.S. 214, 224, 14 L. Ed. 2d 345, 353, 85 S. Ct. 1365, 1371.

Defendant argues that Lieutenant Kozenczak's statements were conclusional and did not identify the sources of his information or answer basic questions such as "Who stated John W. Gacy was in the store two times? How did he, she or they know it was Gacy? Was this information acquired through firsthand or personal knowledge of the informant?" Defendant argues too that the information presented to the warrant judge did not support a reasonable belief that the crime of unlawful restraint had been committed. Defendant suggests:

> "At best, it is perhaps unusual or suspicious when a 15-year-old boy does not return to his place of employment after he says he will be right back. *** Even if Piest's disappearance was suspicious, there is no indication, from the facts cited, that John Gacy had any connection with this disappearance."

Defendant asserts that there was insufficient information to support a finding of probable cause that evidence of the crime of unlawful restraint might be found in the places designated to be searched.

We agree with the People that the sufficiency of the complaint does not rest on whether each segment is complete in itself but whether the complaint, considered as a whole, adequately establishes that there was "a fair probability that *** evidence of a crime [would] be found in a particular place." (*Illinois v. Gates* (1983), 462 U.S. ____, ____, 76 L. Ed. 2d 527, 548, 103 S. Ct. 2317, 2332; see also *People v. Moreno* (1979), 65 Ill. 2d 60, 63.) A common sense reading of the complaint would indicate that Lieutenant Kozenczak received his information from

Kim Byers, Robert Piest's fellow employee, and Mrs. Elizabeth Piest, his mother. That the complaint does not set forth in detail how one of these individuals was able to identify John Gacy as the contractor with whom Piest went to speak is not a fatal defect. Furthermore, much of the hearsay information was received, not from an undisclosed professional informant, but from the victim's mother. That the mother of a missing 15-year-old boy would not be likely to supply misinformation to the police searching for her son was a factor appropriately considered by the judge who ordered the warrant to issue.

The assertion that the complaint contained insufficient facts to establish probable cause is without merit. Defendant concedes that it is proper, under certain circumstances, to consider prior arrests and convictions of a suspect in determining whether probable cause exists. (See *Beck v. Ohio* (1964), 379 U.S. 89, 13 L. Ed. 2d 142, 85 S. Ct. 223; *United States v. McNally* (3d Cir. 1973), 473 F.2d 934.) Here, Lieutenant Kozenczak's complaint indicated that he had information concerning the suspect's criminal history and had discovered a significant pattern of sexual misconduct involving young men. Nor do we agree with defendant that it was not indicative that a crime had been committed but only "unusual" or "suspicious" when a 15-year-old boy stated that he was going to speak with the suspect, left his place of employment, and then failed to return.

Defendant next asserts that the complaint was fatally defective in that it failed to state the time when the informants made their observations. Defendant points out that the complaint stated only that Lieutenant Kozenczak had received this information on December 11, 1978, but does not indicate on what date Piest was last seen at the drugstore. Defendant suggests, in his reply brief, that "[m]issing person cases may remain unsolved for weeks, months, or years." Defendant concludes that

"[W]ithout more specific information regarding time, a reasonable person could not have concluded that evidence of the alleged offense was presently on the premises to be searched." We disagree. A common sense reading of the complaint indicates that Lieutenant Kozenczak received this information while investigating a missing person report at Nisson Pharmacy on December 11, 1978. We conclude that the issuing judge had a substantial basis for concluding that probable cause existed, and we decline to disturb his determination.

Defendant contends next that the warrant failed to describe with particularity the items to be seized. The items to be seized were "Light blue down jacket and hood, tan colored Levi Pants — Brown wedge type suede shoes — lace type — Brown leather wallet — Levi T-Shirt, along with hair samples, blood stained clothing and dried blood samples ***." Defendant argues that because there was no indication as to the alleged owner of the clothing or items, no mention of any sizes, styles or manufacturers, and no explanation as to why the items might be evidence of a crime, the warrant authorized a general search.

Defendant points out that the clothing worn by the 140-pound Piest would be different in size than that worn by a 195-pound man. Defendant argues too that no distinguishing characteristics concerning the wallet to be seized were described in the warrant. We do not agree. The warrant described the color, style, and even the type of material used in each article of clothing described. The T-shirt and pants are even described as to the manufacturer—"Levi." That the wallet could have been described more particularly did not authorize the police to conduct a general search and thus render the warrant fatally defective.

Defendant contends that assuming, *arguendo*, that the search warrant was valid the scope of the search was so broad as to constitute an impermissible general search. The inventory of the items seized listed 57 objects, only one of which, the blue jacket, was listed in the warrant. Two items, a receipt for film left to be developed at Nisson's drug store and a Maine West High School class ring, are of particular significance. It was learned that the receipt was in Piest's possession when he disappeared and the class ring was owned by John Szyc, who had been reported missing. The police photographed a television set in defendant's home, and it appeared to be similar to one which had been taken from Szyc's apartment.

The People contend that the items seized were in plain view and there was sufficient information in possession of the officers to support their conclusion that the ring and receipt in some manner connected defendant with Piest's disappearance.

We disagree that any improper seizure concerning the television set occurred since the television set was not seized. The taking of a photograph does not amount to seizure, and defendant advances no argument as to why the police acted improperly in photographing the television set. Concerning the Maine West High School ring, the police were aware, as indicated by the information contained in the complaint for search warrant, that Piest lived in Des Plaines, was 15 years of age, and that there was a high probability that he attended this high school. Although the ring did not bear Piest's initials, the police officer conducting the search may not have immediately noticed the initials on the ring, and, in any event, the police were aware, at this time, that defendant could very well be a habitual sex offender and that more than one victim could be involved. The film receipt which was found in a waste basket in defendant's home showed that film had been left for development at Nisson's Pharmacy and would tend to show that he had been in the

pharmacy. We find no error in the seizure of the photo-finishing receipt or the high school ring.

A search warrant issued on December 21, 1978, authorized the police to search defendant's home for the remains of the body of Robert Piest. The underlying complaint for the warrant, prepared by Lieutenant Kozenczak, basically reiterated the facts contained in the first complaint for search warrant and stated:

> "Recovered during that search [pursuant to the December 13th warrant] was a customer receipt #36119 from a film developing envelope with the name and address of Nisson's Pharmacy stamped on it in ink. Further investigation revealed that this receipt had last been in the possession of Robert Piest, immediately prior to the time he had disappeared."

The complaint also stated that Officer Robert Schultz had informed Lieutenant Kozenczak that he had been invited into defendant's home by defendant while on the surveillance unit assigned to watch defendant, and that while inside he detected "an odor similar to that of a putrified human body." Officer Schultz indicated that he had smelled the odor of at least 40 putrified human bodies and that the smell in defendant's home was similar. Defendant's first two arguments concerning this contention assumed the invalidity of the first warrant. Since we have held to the contrary, we need not address these issues. Defendant's third argument concerning this contention is that even assuming the validity of the December 13 search, the underlying complaint for the December 21 search warrant failed to satisfy the two-prong test of *Aguilar v. Texas* (1964), 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509.

Defendant makes two contentions concerning the showing of probable cause in the complaint for the search warrant. First, defendant notes that the complaint does not explain the basis for Lieutenant Kozenczak's conclusion that the photo-finishing receipt was on

Robert Piest's person at the time of his abduction. The testimony at the hearing on the motion to suppress showed that Des Plaines police officers had spoken with Kim Byers and that she had said that she was wearing Robert Piest's jacket when she filled out the photo-finishing envelope, ripped off the receipt, and placed it in the jacket pocket. She later returned the jacket to Piest, who put the jacket on before leaving the store. Defendant asserts that, because this information was not contained in the complaint, this court may not make reference to this information in determining whether the complaint established probable cause. Defendant also complains that Officer Schultz did not promptly notify Lieutenant Kozenczak about the smell of decaying flesh and this casts doubt on the veracity of Officer Schultz' conclusion.

We find that the complaint, when viewed as a whole, is sufficient, and the circuit court correctly refused to suppress the evidence seized as the result of the warrant's execution. We agree with defendant that evidence adduced at the suppression hearing may not be used to bolster the sufficiency of the complaint for warrant. We do not agree, however, that the fact that Officer Schultz waited some 40 hours before telling Lieutenant Kozenczak of the odor he detected while in defendant's home automatically invalidated the probative value of this evidence. The 40-hour delay in bringing this information to Lieutenant Kozenczak goes to the issue of the credibility of Officer Schultz, an issue for resolution by the circuit court, and not this court on review. We hold that the evidence of the smell of decaying flesh in defendant's home, discovery of a film receipt purportedly on the victim's person at the time he disappeared, and the reiterated facts contained in the first warrant, taken together, provide a sufficient basis for the circuit court to refuse to suppress the evidence seized as a result of the execution

of that warrant.

Defendant argues that the evidence obtained as a result of the searches executed pursuant to the final three warrants must be suppressed as fruits of the prior illegal searches. Because we have already determined that the prior searches were not illegal, this argument must fail.

Defendant next contends that two days before his arrest he asked a police officer, in the event of his arrest, to inform his attorney, and that the police officer's failure to communicate with defendant's attorney before questioning him violated his fifth and fourteenth amendment right to have counsel present at his interrogation. Defendant also contends that his first confession was not the product of a rational mind or a free will, and that his second confession and all statements subsequently made were the product of "ineffective advice" from his attorney to confess. Although no objections were made at trial to the admission of these confessions, defendant argues that the plain error rule should be invoked or, alternatively, that the failure to object is evidence of the incompetency of counsel.

Criteria for determining whether the doctrine of plain error should be invoked have been enunciated by this court, i.e., whether the evidence is closely balanced, or if the error is of such a magnitude that the accused is denied a fair and impartial trial. (*People v. Szabo* (1983), 94 Ill. 2d 327, 355.) We find here no reason to invoke the plain error doctrine. Defendant's supposed invocation of his right to counsel when talking to Officer Hackmeister was apparently no more than a request that the officer contact defendant's attorney when he was finally arrested, because defendant had received money from out of State to be used to post his bond. The record shows that defendant was in continuous contact with his attorneys during the days prior to his arrest and that on the night before his arrest he had told his attorneys that he was responsible for 33 murders. Defendant was read his rights and had read and signed a waiver form given him by the Des Plaines police department. Nothing in the record supports defendant's contention that his confessions were not the product of a free and rational mind, and, moreover, failure to assert his objection at trial precluded the circuit court from making a record on this point so that this court could properly review such a contention. Nothing in the record supports defendant's contention that trial counsel encouraged him to confess, but even if defendant's attorneys had done so the night before he was arrested, such a decision on their part could easily be viewed as a legitimate defense tactic. Justice Jackson's observation that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances" (*Watts v. Indiana* (1949), 338 U.S. 49, 59, 93 L. Ed. 1801, 1809, 69 S. Ct. 1347, 1358) is inapplicable to this situation. If defendant had revealed to his attorneys any details whatsoever concerning the 33 murders, defendant's attorneys were aware that some 27 or so bodies were buried in the crawl space and in other parts of defendant's home and that the police were on the verge of uncovering these bodies. Moreover, defendant's attorneys would have been aware that the Des Plaines police had positively linked defendant to Robert Piest's disappearance and that further links between defendant's young former employees and their disappearances would be discovered. Under these circumstances it does not indicate incompetence on the part of defendant's attorneys that they concluded that an assertion of innocence would border on the ridiculous and that confessions might bolster a possible insanity defense. The fact that even the earlier newspaper accounts suggest that defendant had a significant mental disturbance supports the assertion that defend-

ant's attorneys could have immediately concluded that an insanity defense would be the most realistic defense in this case. In light of defense counsel's able representation of defendant throughout the trial proceedings, we reject the contention, made by appellate counsel, that trial counsel "abandoned [defendant] and rendered ineffective assistance of counsel ***."

Concerning the manner of selecting the jury at his trial, defendant contends that the court's questioning during *voir dire* was insufficient; that the jurors should have been sequestered during the time between their selection and the beginning of the trial; and that the *voir dire* should not have been conducted in open court. Defendant contends too that his counsel and the counsel for the prosecution should have been permitted to directly interrogate the prospective jurors instead of being required to rely upon the court's questioning; that he should have been permitted peremptory challenges in addition to the 20 permitted by statute; and that the court's questioning of the prospective jurors concerning their attitudes toward the death penalty produced a biased jury.

Defendant contends that the court's questioning was inadequate because it did not sufficiently explore the prospective jurors' exposure to news accounts of the case. Defendant cites a number of instances which he asserts show that questioning on this topic was insufficient. As pointed out by the People, however, the circuit court announced at the outset of the questioning that counsel, if they felt it was necessary, would be permitted to request more questions on specific topics during questioning of a prospective juror. Defendant has listed only one instance where his request for additional specific questions on exposure to news accounts was denied. In that instance, defendant requested that the court ask a prospective juror "what he remembers out of the newspapers *** what he remembers specifically out of the newspapers and radio." We find that while the court might properly have made such an inquiry, it was not required to do so because the court questioned the prospective juror sufficiently as to the sources from which he had learned of the case, and whether he had formed an opinion from these sources and from persons who may have expressed opinions about the case. The prospective juror stated that from what he had heard and seen he did not come to the conclusion that defendant had committed the offenses in question. On these facts, in view of the discretion vested in the circuit court in the examination of jurors, we find no reversible error. (*People v. Moretti* (1955), 6 Ill. 2d 494, 532.) It should be noted that in each of the other references to the record that defendant contends show insufficient questioning on this matter, defendant was given an opportunity to suggest further questions when the court had completed its interrogation, and failed to do so. Defendant did suggest questions on other subjects for the court to ask, and these were generally pursued. In certain of the instances cited by defendant, further questioning was unnecessary because those jurors were excused for cause.

Defendant's next disagreement with the court's questioning concerns the prospective jurors' opinions as to defendant's guilt. The record shows that defendant was given the opportunity to request that the court ask specific questions as to the prospective jurors' opinions of the guilt of defendant. Defendant complains of the questioning of Mrs. Loudenback, a prospective juror, but the record shows that after she was questioned by the court, the court inquired if there were further questions and defense counsel replied that he had "no more questions." In other instances cited by defendant, no error was committed because counsel was given the opportu-

only to suggest additional questions concerning the potential jurors' opinions as to defendant's guilt and failed to do so, or the juror was excused for cause.

Defendant's next objection to the circuit court's questioning of prospective jurors concerns the insanity defense. Defendant complains of the colloquy between the judge and the first prospective juror. The record shows that when defense counsel protested the inadequacy of the questioning the court asked a number of additional questions. Defendant challenged the juror for cause on the ground that he had a preconceived predetermined opinion on the question of defendant's insanity but counsel proposed no additional questions to be asked of the juror. Simply stated, defendant's complaint concerning the questioning of the panel is that it was done "in such a way as to hide the jurors' biases rather than reveal them." The purpose of the circuit court's questioning was to enable the attorneys to exercise their peremptory challenges intelligently, and to determine whether a juror should be excused for cause. The record shows that the circuit court's questioning of this prospective juror was sufficient to fulfill both these purposes. We have reviewed the other portions of the record cited by defendant in support of his argument that the circuit court's questioning was insufficient. In most of these cited instances, defense counsel did not suggest additional questions to be asked of the prospective jurors. In certain instances, where defense counsel asked the court to question the prospective jurors further on the insanity defense, the court did so. On this record, defendant cannot complain that the questioning was insufficient to permit him to challenge jurors for cause or to exercise his peremptory challenges.

Defendant contends next that the circuit court did not adequately question the prospective jurors concerning their attitude toward homosexuality. Our review of

the instances cited by defendant shows that with every prospective juror defendant had the opportunity to tender specific questions and failed to do so. In the example cited by defendant, counsel did not tender a specific question, but asked the circuit court to inquire generally about the prospective juror's feelings toward homosexuality. Under the circumstances the court's refusal to do so was within its discretion.

Defendant's next disagreement with the manner in which the *voir dire* was conducted concerns the court's questioning on the prospective jurors' attitudes toward the death penalty. Defendant complains that the questions concerning the death penalty, as they were reframed after the interrogation of the first 15 jurors, made it much less likely that a prospective juror would reveal that he strongly favored the imposition of the death penalty. While we agree that the questions asked of the later jurors allowed for shorter responses, we do not find in the record any questions tendered by defense counsel that might have elicited a more thorough response. In the first example of the revised questioning used by the circuit court of which defendant now complains, when the *voir dire* of this juror was completed, defense counsel was asked if he had any further questions and responded that he did not. In the other instance cited by defendant, the prospective juror was excused for cause, so no error could have been committed in his questioning. Therefore, we hold that defendant waived his opportunity to discover more about the prospective jurors' attitudes about the death penalty by failing to tender additional questions during the *voir dire*. We also note that no questions concerning the death penalty appear in defense counsel's list of questions submitted to the circuit court prior to *voir dire*.

Defendant next complains that the circuit court failed to inquire further of prospective jurors who mentioned

that other jurors had been discussing the case. The record reveals, however, that defense counsel only requested that the court ask the prospective jurors what they knew of other jurors' opinions about the case. The circuit court's response was that the prospective jurors themselves would reveal their own opinions during *voir dire*. We cannot say that the circuit court abused its discretion by proceeding in this manner. The court was under no obligation to question the prospective jurors further upon hearing that they had merely heard other prospective jurors discussing the case. The cases cited by defendant in this regard are distinguishable. In *People v. Cravens* (1941), 375 Ill. 495, the trial court was given information after a trial that one of the jurors, who had become foreman of the jury, knew the defendant previously and had already concluded that he was guilty. During the *voir dire* of that trial, this same juror stated that he knew nothing about the defendant and had not expressed any opinion as to his guilt or innocence. On those facts, the defendant was granted a new trial. It is not contended here that any of the prospective jurors deceived the court, but only that more information should have been obtained concerning their opinions of the case. As previously noted, defendant was permitted to propose additional questions if he believed the *voir dire* insufficient, but has cited no instance where specific questions were proposed and rejected by the court. In *People v. Peterson* (1973), 15 Ill. App. 3d 110, cited by defendant, the circuit court received information just before trial that one of the jurors had expressed her opinion that the defendant should plead guilty so that the jurors could go home. Defendant has cited no instance of failure to excuse for cause a prospective juror with a preconceived opinion but contends that the circuit court did not question the prospective jurors sufficiently to discover such opinions. Defendant's failure to suggest specific questions to be asked of prospective jurors to elicit such preconceived opinions leaves us with nothing to review.

Defendant contends next that the failure to sequester the jury between the time of their selection and the beginning of trial denied him his right to a fair and impartial jury. Defendant complains that this procedure allowed the jurors to be exposed to media coverage of the case, and to discuss the case with their family members and friends. The People correctly point out that defendant neither moved to sequester the jury over this time, nor later asked for a mistrial, nor was it shown that any prejudicial media coverage occurred during the time in question. We also note that immediate sequestration would have placed a great burden on the jurors, who may have been able to use the week to organize their personal affairs before leaving town for a lengthy trial. As noted by the People, placing a greater burden on the jurors may have angered them, and the defendant might well have been the most likely target for their anger. (See *United States v. Haldeman* (D.C. Cir. 1976), 559 F.2d 31, 85.) For this reason, defense counsel may have decided as a tactical matter not to ask that the jury be sequestered before trial.

Defendant contends next that the extensive publicity surrounding his trial made it imperative that the *voir dire* be closed to the public. Defendant argues that the extensive publicity caused many prospective jurors to be hesitant to answer questions completely and truthfully. Defendant also contends that the news media, permitted to attend the *voir dire*, could reveal the questions leading to excusal of jurors, thus enabling prospective jurors to learn of these questions and formulate answers which would either avoid or require their own excusal. We note first that defendant did not request the public be excluded from *voir dire* proceedings until after a number of jurors had already been questioned. When defendant

did ask that the remainder of the *voir dire* be closed to the public, he did so only on the bare assertion that prospective jurors were not being fully candid. The Supreme Court has held that the press and general public have a constitutional right of access to criminal trials. (*Globe Newspaper Co. v. Superior Court* (1982), 457 U.S. 596, 603, 73 L. Ed. 2d 248, 255, 102 S. Ct. 2613, 2618; *Richmond Newspapers, Inc. v. Virginia* (1980), 448 U.S. 555, 558-81, 65 L. Ed. 2d 973, 978-92, 100 S. Ct. 2814, 2818-30 (plurality opinion).) This right is not without limits (see *Press-Enterprise Co. v. Superior Court* (1984), ___ U.S. ___, 78 L. Ed. 2d 629, 104 S. Ct. 819), and defendant has not shown a sufficient basis upon which to invoke a limitation to that right. While it is true that prospective jurors may be reluctant to discuss their attitudes towards homosexuality, or prior dealings with the criminal justice system, this danger may exist in any *voir dire*, and the presence of the news media was not reason enough to close the proceedings to the public. While the sixth amendment guarantees the accused a right to a public trial, it does not give a right to a private trial. (*Gannett Co. v. DePasquale* (1979), 443 U.S. 368, 382, 61 L. Ed. 2d 608, 623, 99 S. Ct. 2898, 2907.) To close the proceedings to the public requires a more compelling reason than was shown to exist here. *Richmond Newspapers, Inc. v. Virginia* (1980), 448 U.S. 555, 580-81, 65 L. Ed. 2d 973, 991-92, 100 S. Ct. 2814, 2828-30.

Defendant contends next that the circuit court's refusal to permit the attorneys to ask questions during *voir dire* denied him due process of law and the right to a fair and impartial jury. Our Rule 234 states that "[t]he court shall conduct the *voir dire* examination of prospective jurors." (87 Ill. 2d R. 234.) In *People v. Jackson* (1977), 69 Ill. 2d 252, 260, we held that while a defendant has a right to trial by an impartial jury, that right

does not require that the parties themselves be permitted to interrogate the jurors. Defendant cites *Silverthorne v. United States* (9th Cir. 1968), 400 F.2d 627, in support of his contention that, when a case has received extensive pretrial publicity, the attorney should be permitted to interrogate the jurors. *Silverthorne* is distinguishable, however, since the trial court in that case failed to discuss the publicity issue individually with a number of the prospective jurors, and undertook little or no questioning of the jurors as to what they had heard or seen about the case. Here, the circuit court interrogated each juror individually as to the publicity issue, and asked detailed questions concerning the jurors' sources of information. The circuit court also permitted the attorneys to suggest additional questions when they felt the court's questioning was inadequate. In many instances, defendant had no other questions to ask of the jurors. Thus, on these facts we cannot say that the court abused its discretion by choosing to personally interrogate the jurors.

Defendant also complains that he should have been permitted more than the 20 peremptory challenges allowed by statute. We note first that defendant did not exhaust the peremptory challenges that he was given. (Ill. Rev. Stat. 1977, ch. 38, par. 115—4(e).) The only case cited by defendant in his brief in support of his contention is *People v. Speck* (1968), 41 Ill. 2d 177. That case is inapplicable, however, since the parties in that case agreed to give each side a higher number of peremptory challenges than allowed by statute. There was no error in limiting defendant to 20 peremptory challenges.

Defendant next complains that the examination of the prospective jurors on their attitudes toward the death penalty resulted in the selection of a jury which failed to represent a fair cross-section of the community and

which was biased in favor of the prosecution. Defendant admits that his argument on this point was rejected by this court in *People v. Lewis* (1981), 88 Ill. 2d 129, 146-47, and in *People v. Carlson* (1980), 79 Ill. 2d 564, 585-87. Having previously considered and rejected defendant's arguments, we decline to reconsider them here.

Defendant contends that because of the circuit court's refusal to provide funds for a publicity survey and a publicity analysis he was denied the right to a fair trial and the effective assistance of counsel. Before trial, defendant sought a change of venue and then moved for the appointment of a market research firm "to conduct a valid statistical survey both within and outside of Cook County to determine the effect of pretrial publicity on the temperament of those members of the community or communities who are potential veniremen for this cause." The circuit court told defense counsel that in order for the court to properly evaluate the motion, counsel needed a letter from the research firm explaining what the firm proposed to analyze and how such an analysis would be conducted. Defense counsel filed an amended supplemental motion with a "proposal for venue survey" as an appendix. The proposal was submitted by the National Jury Project and explained in detail the purpose of the survey and the manner in which it was to be conducted. In addition to determining the extent of exposure of potential jurors to news media coverage, the National Jury Project proposed to obtain information concerning "collateral prejudices" such as the potential jurors' attitudes on the issues of sexual preference, deviant behavior, and the "impaired mental state defense." The cost of the venue evaluation was estimated at approximately $38,000, although confining the survey to a limited number of counties and applying other cost-cutting measures could have reduced the budget. The supplemental motion was denied.

A publicity survey was performed by Editec, Inc. In addition, materials were submitted by the Chicago Sun-Times, the Chicago Tribune, Paddock Publications, and publishers from Winnebago, Champaign, Sangamon, and Peoria counties. Dr. Richard Ney, a psychologist, was called to interpret the data contained in the survey and the material gathered from the press and electronic media. Dr. Ney explained that there were a number of factors that should be considered in analyzing the effect which publicity has on a particular geographical location. The first factor was sheer volume. The more articles and news reports disseminated in a particular location, the more likely that area's inhabitants would recall the event.

Dr. Ney explained that the second factor to be analyzed in determining the impact of media coverage is the emotional impact created by certain types of articles. Six types of articles generate strong emotional responses. First, articles which made reference to "homosexuality" elicited emotional responses. Second, pairing homosexuality with the term "mass murderer" had a strong emotional impact because it combined the number of deaths with the "topic of death." The two Chicago newspapers carried many of these first two types of articles when the story first broke, but discontinued them a week to a month later. Third, "human interest" stories focused on an individual's involvement in the case rather than the actual facts of the case. Human interest stories were particularly prevalent in the Chicago area, but not in the outlying counties. Fourth, certain articles compared defendant to other notorious mass murderers. These articles were labeled "guilt by association" articles. Fifth, articles labeled "quasi-legal" articles spoke of how a defendant could "beat the rap" by using the insanity defense to avoid criminal responsibility. While such articles purportedly dealt with legal issues, they were loaded

with emotional terms and tended to bias the reader towards the view point of the writer. Sixth, articles labeled "local interest" articles described the particular impact defendant's case would have on the people of Cook County, such as the cost of trying him and providing for his defense. Dr. Ney explained that in all these categories, there was "more of this type of emotionally impacting material" in Cook County than in any of the other outlying counties. Dr. Ney explained that people in other counties would know about the case, but that there would be a difference in the type of material by which they received the information concerning defendant's crimes.

Another factor to be considered was reports of statements made by public officials. Statements made by public officials carried more weight because readers recognized the status associated with that public official's office. The fourth factor to be considered was the use of headlines. The larger the headline, the more important a reader would believe the information contained in the article was. Also, the type of material contained in the headline would have a significant impact on the reader. For example, instead of stating "33 boys slain" in a headline, the Cook County news media would use a day-by-day "body count," such as "bodies of 3 teens found, 29 more are feared slain." Again, in both these areas the impact in Cook County was much greater than in the other counties of the State.

Dr. Ney identified four principles which could be used to gauge the effect these factors had on the reading audiences exposed to these materials. The first principle was the "primary-recency effect," or the concept that the news best remembered was that first received and most recently received. The second effect was the "halo" effect, or the concept that the manner in which information is presented could affect the reader's understanding of that information's content. For example, referring to defendant as an "admitted homosexual" could give the reader a negative attitude towards the defendant which could make it difficult for that reader to objectively view the remaining information contained in the article. The third principle was called "the law of proximity" and basically means that two concepts, when placed in close proximity, will be viewed as a psychological unit. Thus, when an article appeared with a headline reading "A killer goes free, how can it happen?" and a picture of the defense attorney appeared below the headline, the reader would associate the defense attorney as one who freed killers, regardless of whether the article made such an assertion. The final principle, which is actually a series of principles listed under one heading, Dr. Ney labeled the 'cognitive memory theory." Under this theory, information which is associated with a strong emotional response is much more easily remembered than information which does not evoke a particular emotional response. Thus, memories concerning bizarre behavior, violent crime, or sex are retained longer than information concerning nonviolent crime or other less emotional events.

These principles, as applied to the media coverage in this case, Dr. Ney explained, each illustrated that the news media coverage in Cook County was much more prejudicial to defendant than in other counties. In particular, human interest stories appeared predominantly in the Cook County news media. The public in Cook County more easily identified with the crimes because the victims lived in the same area as they did and they recognized the public officials involved in the investigation. Also, because of the prejudicial nature of the articles printed in Cook County, such as the articles associating defendant's trial counsel as one who sets killers free, prospective Cook County jurors were more likely to have

prejudicial preconceived ideas about defendant's cause.

In arguing for a change of venue, defense counsel stressed that the defense had met its burden in showing that there was a reasonable likelihood of prejudice "in Cook County itself and nowhere else ***," that the violent publicity was "far greater" in Cook County than in the other five counties that were studied, and that the prejudicial impact of which Dr. Ney spoke existed in Cook County but not in the other five counties studied, and that "the feeling that Mr. Motta and I have gotten visiting other counties was that there is a knowledge of the case, but there is not the same pattern of deep-rooted prejudice against the defendant" as there was in Cook County. The court granted defense counsel's motion for change of venue, specifically finding that there was "a substantial decrease of publicity outside of Cook County, perhaps strikingly so," and that even though publicity would be generated in whatever county the jury selection was conducted, this was the best method of insuring a fair trial for defendant. The circuit court emphasized the emotional connection that the inhabitants of Cook County had with this case because of the type of publicity, *e.g.*, human interest stories and community interest stories, combined with the "particular community interest" in determining that the prejudicial impact of news reports required a change of venue. The jury was selected in Winnebago County and the trial was held before that jury in Cook County.

Defendant contends that he had insufficient information to determine whether Winnebago County had been unduly influenced by prejudicial publicity and that this constitutes reversible error. We disagree. While Dr. Ney did suggest that he had insufficient information to determine which of the five counties outside of Cook County had the least amount of prejudicial publicity, the reason for suggesting that Cook County's publicity was prejudicial was that the crime occurred in Cook County. Citizens living in other counties, by definition, would not establish the emotional tie to the crimes based on geographical location and the belief that the crime was significant because it happened in their community. While Dr. Ney indicated that people in Illinois might relate to the crime to some degree because of the jurisdictional boundaries of Illinois, more so than, say, a citizen of Montana, it must be kept in mind that the case had to be tried in some community in the State of Illinois. (*People v. Speck* (1968), 41 Ill. 2d 177, 183.) Also, as was indicated during the hearing on this matter, if defendant was convicted of this crime, he would have been guilty of the greatest number of murders for which any one person had ever been convicted. Consequently, it was inevitable that news coverage would be significant in any part of the country.

Defendant had no right to be tried in the county which was most likely to be favorably disposed to defendant and his theory of defense. The contention that the circuit court was constitutionally mandated to provide funds for a study which would have "included a determination of the attitudes on the issues of sexual preference, deviant behavior, and the insanity defense" of the five major counties in Illinois is untenable. The right to a jury trial has been interpreted by the Supreme Court as the right to an impartial jury selected from a representative cross-section of the community. (*Witherspoon v. Illinois* (1968), 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770.) But just as the People may not select a jury which is predisposed on a pertinent issue which will arise at trial, the defendant may not seek out a county in which prospective jurors will most likely be predisposed on the defenses which the defendant will raise. We agree with the People that the defendant's request was, in effect, an attempt to substitute public opinion polls for

the process of *voir dire*. We find no error in the circuit court's refusal to allow funds for this expenditure.

Defendant raises 14 issues concerning the presentation of his insanity defense to the jury. Because of the number of issues and because one of the contentions is that the People failed to prove beyond a reasonable doubt that defendant was sane at the time of the alleged offenses, a review of the evidence is necessary.

The People, in opening statement, reviewed the facts of the case as revealed by the investigation conducted by the Des Plaines police department and others and then described in detail several of the murders as recounted by defendant in his confessions. The assistant State's Attorney stressed that the confessions of defendant, as corroborated by physical evidence and the testimony of other witnesses, would show that defendant committed the murders because the victims were "an inconvenience to him" and that the murders were the results of premeditated and rational acts. The assistant State's Attorney urged the jurors to utilize their "common sense" while listening to the testimony of the expert witnesses who would testify in this case. Defense counsel also urged the jurors to use their common sense, and told them that the evidence would show that the acts of defendant were not those of a normal, rational person. Defense counsel stated that the evidence would demonstrate that defendant followed a pattern which showed "a profound, incredible obsession." Defense counsel stated: "We will hear a lot of evidence, great detail, that John Gacy went out in the evening, picked up boys, and these boys were all the same—in the same category; certain age group, certain body build, certain color hair, certain sexual preferences." Defense counsel stated that four psychiatrists would be called for the defense and that "[t]hese psychiatrists will testify that Mr. Gacy demonstrates a host of seemingly neurotic symptoms, ***

and will continue to be dangerous, he requires intensive psychiatric treatment within an institution for the rest of his life." Defense counsel also stated: "Those psychiatrists will testify that he was unable to fully and consciously control his acts, which are motivated by overwhelming and uncontrollable primitive drives." Defense counsel then proceeded to impugn the reputation of the psychiatrists who would testify for the People, calling Dr. Robert Reifman "a mechanic for the State," stating that Dr. James Cavanaugh had "an iron-clad inflexible bias," and that Dr. Jan Fawcett would testify on behalf of the People because defendant's cause was too unpopular for the doctor to associate himself with the defense. Defense counsel stated: "The defense of insanity is valid and it is the only defense that we could use here, because that is where the truth lies." Again, counsel stated that "this man belongs in a hospital for the rest of his life."

Witnesses testified that 29 bodies were recovered from the crawl space under defendant's home, under his driveway, and under his garage, and that five bodies were recovered from the Des Plaines River. Medical experts working for or in association with the Cook County medical examiner explained how identifications were made on the remains of these bodies and testified that one body, identified as body No. 9, had an incised area on the upper portion of the fifth rib and two incised areas on the left lateral of the sternum which were consistent with stab wounds. Six bodies were found with ligatures around their necks, and 13 bodies were found with foreign bodies in the posterior aspect of the mouth and throat. The official cause of death for those bodies with materials impacted in the mouth or the throat was "asphyxia due to suffocation," but it could not be determined medically whether the cloth was inserted before or after death. Several of the life and death witnesses

testified that the victims were not homosexuals, but had steady girl friends, had just begun to date girls, or had plans to marry.

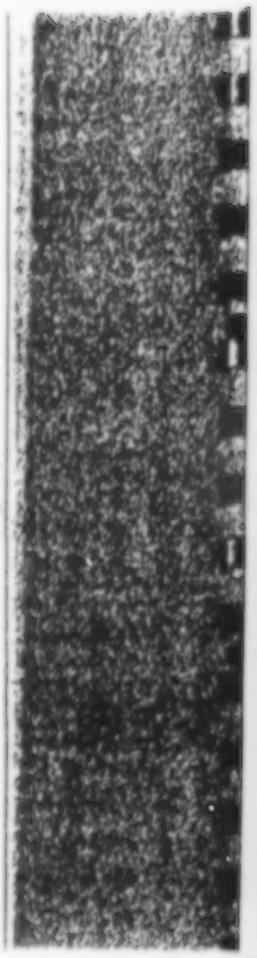
Former business associates, friends, and employees of defendant testified concerning defendant's actions during the period when the murders were committed and shortly before his arrest. David Cram worked for defendant and moved in with him after defendant was divorced from his second wife. He testified that defendant told him that he had a degree in psychology, which he needed in order to more easily manipulate people. Defendant admitted that he was bisexual, that he was not a big drinker, and that he never "went crazy" when using drugs or alcohol, or both. Cram testified that defendant had him dig trenches in the crawl space, purportedly for drainage purposes, and that defendant had him spread lime throughout the crawl space to rid the crawl space of its pungent odor. Cram testified that he was with defendant after the police had executed the first search warrant and that when they returned to defendant's home, defendant asked Cram to check the crawl space. Cram refused, so defendant checked the space and appeared "shook up about it." Ronald Rhode, a cement contractor who worked with defendant, stated that shortly before defendant was arrested he told him: "Ron, I've been a bad boy *** I killed 30 people, give or take a few." Defendant told him that he had some doctors that "were on his side," and that he thought he would go free. Tony Antonucci also worked for defendant. He testified that defendant openly admitted that he was bisexual. He testified that defendant once asked him if he would engage in homosexual activity if it "meant his job." Antonucci testified that defendant once came over to his house to show him stag films. They began wrestling, and defendant managed to put handcuffs on Antonucci. Defendant then unbuttoned Antonucci's shirt

and unbuckled his pants and pulled them down to his knees. Defendant then left the room. Antonucci managed to get out of one of the cuffs, but pretended that he had not, and when defendant returned to the room Antonucci placed the handcuffs on defendant. Defendant then stated: "You're the only one that not only got out of the handcuffs, but put them on me." Antonucci stated that after defendant had been handcuffed he continued to speak to him in a rational manner. Michael Rossi also worked for defendant. Defendant had sold him a car previously owned by John Saye, who was later discovered to be one of defendant's victims. Rossi testified that on December 21, 1978, he went over to Cram's house to drop off some of defendant's tools, and that while he was there defendant arrived. He stated that defendant was emotionally disturbed, acted very nervous, and was "breaking into tears." He stated to Cram and Rossi that on the preceding night he had confessed more than 30 killings to his lawyers. Rossi testified that he had helped dig trenches in the crawl space, and supervised newer employees who were directed to dig trenches in the crawl space. He stated that defendant was very sensitive about where the employees dug, and would place markers designating the specific area in which the trenches were to be dug. Rossi testified that defendant was not a heavy drinker, that he complained of his health often, told Rossi that he had leukemia and once experienced something that appeared to be a heart attack, but that his health never prevented his getting his work finished.

Several police officers and an assistant State's Attorney testified concerning defendant's confessions. Prior to his arrest, defendant had stated to the police officers who were following him that "clowns can get away with murder." Before his arrest, defendant unplugged the sump pump in his crawl space so that it would fill up with water and removed the ladder descending into the

crawl space. After confessing to the murders, defendant spoke of "four Johns" and told the police that he did not know all of the personalities. He told Detective Michael Albrecht: "Mike, I won't be in jail very long for this, I won't spend a day in jail for this." He described the murder of Robert Piest in some detail, and stated that after he had put the rope around Piest's neck he twisted it twice, but then the phone rang, so he went to answer the phone, and left Piest to die of suffocation. Apparently referring to one of his four personalities, defendant told police that "Jack does not like homosexuality." He told police that the victims had all sold their bodies for $20 and that they had killed themselves. Defendant told Investigator Bedoe that all of his victims had come to his house voluntarily, that all the murders concerned money, and that they all occurred in his house. In describing the disposal of Robert Piest's body, defendant told Investigator Bedoe that he had to make "two or three passes" at the bridge where he was going to throw the body in the river before the bridge was clear of other traffic. Investigator Bedoe testified on cross-examination that defendant openly admitted that he was bisexual, but expressed a tremendous fear of being a homosexual. Officer Phillip Bettiker testified that defendant said that Piest said that he would do almost anything for a great deal of money. Defendant used a rosary to demonstrate to Officer Bettiker and the other persons in the room at the time of the confession the "rope trick" that he used to strangle his victims. He stated that he did not have anal sex with Piest, but that "Jack might have." Defendant stated that he did not use the lime to speed up decomposition of the bodies, but rather used muriatic acid for this purpose. The lime was used, defendant explained, to sweeten the smell of the crawl space. After drawing a diagram of where the bodies were located in the crawl space, defendant put his hands over his face and stated:

"What's going on. Jack drew that diagram of the crawl space." Lawrence Finder, an assistant State's Attorney, testified that defendant was emphatic about the fact that there were no bodies buried underneath his driveway. At the time of his confession, the driveway was still intact. Later, a body was found buried underneath the driveway. Defendant admitted to some 1,500 homosexual relationships. Defendant stated that he killed "Joe from Elmwood Park" because he wanted more money for the sex act, and that he would tell defendant's neighbors that he was homosexually raped by defendant if he did not pay the extra money. Defendant stated that the killings became less frequent later on because he was working so hard, and he was too tired to "go cruising." Defendant described the killing of John Butkavitch, and stated that since Butkavitch threatened to kill him if he was released from his handcuffs, he killed Butkavitch instead. He stated that Greg Godzik had dug his own grave, and that he had killed John Szyc because he had asked for more money. Defendant told Finder that he usually killed his victims for one of two reasons: because the victim demanded more money than originally agreed upon or because they posed a threat to him by exposing his sexual preferences to his neighbors. Defendant explained that Robert Piest did not fit the pattern. He had handcuffed Piest after Piest had come to his house with him to discuss the possibility of employment. Defendant placed handcuffs on Piest, and then attempted to perform oral sex on him, but could ... since Piest could not get an erection. Because Piest "became frightened" defendant worried that he might tell somebody what had happened, so he performed the "rope trick" on Piest. Defendant stated that only "Jack Hanley" knew why Piest's body was put into the river. Defendant explained that he would frequently stuff socks into the mouths of victims to prevent the blood coming through the mouth



after death from staining the floor. He stated that he had graves dug so that he would have graves available.

Defendant called two witnesses who described defendant's assaults upon them. Jeffrey Rignall testified that one night when he was walking to a local bar, defendant offered him a ride. Once inside the car, defendant placed a cloth soaked in chloroform over Rignall's face, causing him to lose consciousness. Defendant carried Rignall into his house and offered him a drink. Defendant appeared very relaxed. Defendant then chloroformed him again. When Rignall regained consciousness, he found himself restrained on a wooden board which was suspended by chains. The board had holes in it where his arms went through and where his head was placed. Defendant, who was naked, was standing directly in front of Rignall masturbating. Defendant then grabbed Rignall's head and shoved his penis into Rignall's mouth, shouting: "You love it, you love it," with a tone of voice used by a drill instructor. Rignall lost consciousness several more times, and when he regained consciousness defendant shoved an unidentified object into Rignall's rectum. He repeatedly stated, "You love it," talked in obscenities, and "made it clear" to Rignall that defendant was in complete control. The next thing Rignall remembers is waking up, wearing only his blue jeans, next to a statue in a park near his home in Chicago. It was very cold outside. His face was scarred and swollen and he was bleeding from his rectum. Rignall testified that he was currently under psychiatric care and was also receiving treatments for his liver because the repeated use of chloroform had damaged his liver. Rignall was of the opinion that defendant was not legally sane at the time of this episode and stated that he reached this opinion "by the beastly and animalistic ways he attacked me." Michel Ried testified that he was a homosexual and met defendant in "New Town." After

a brief conversation, he and defendant engaged in sex for which defendant paid Ried. Ried testified that he was having difficult times financially, and that defendant gave him a job and allowed him to move in with him. One night in defendant's garage, which at the time was unlit, defendant told Ried to get some fuses which were under the work bench. As he did, defendant hit him with a hammer. Ried got up and saw that defendant had his arm cocked back as if he were going to strike again and had a "kind of strange" look in his eyes. Ried grabbed defendant's arm and asked him what he was doing. Defendant just looked at him, put the hammer down, and told Ried that he did not know what had come over him, but that he felt like he wanted to kill Ried. Defendant then "patched up" Ried's head. Ried stated that at the time of this incident he did not think defendant knew what he was doing. On cross-examination, Ried stated that he might have had an argument with defendant before this incident occurred. Several weeks earlier, defendant and Ried were attempting to break into a house and Ried saw defendant coming from behind him with a tire iron in his hand. When Ried turned around and saw him coming, defendant stopped and stated that he thought there might be trouble. Ried stated that, at the time of the incident with the hammer, he had not looked at defendant before defendant struck him.

Several members of defendant's family and childhood friends testified concerning defendant's past. Defendant's sister testified that their father was never pleased with defendant and told him that he would turn out to be a fairy, just like his friend, Barry. Defendant's sister stated that their father had a Dr. Jekyll and Mr. Hyde type personality. Their father would come home from work, lock himself in the basement, and drink. Often he would come back up and eat dinner with the family, but if anyone said anything that displeased him, he would

lunge across the table at them. The night before defendant's sister was to marry, defendant and his father got into an argument over whether or not defendant would take a bath that night. Defendant's father held defendant against the wall and said: "Hit me *** what's the matter with you? Are you a coward? *** Hit me. You will never stick up for yourself." Defendant's father tripped on a chair and fell, accused defendant of tripping him, and threatened to kill defendant. Defendant's sister stated that she once found silk underpants in defendant's bed, and that when she was five or six years old, defendant had taken his mother's underwear and put it underneath the porch. She testified that the basement was locked and the children were never permitted to go down there unless accompanied by a parent. She testified that on the night before her wedding, her husband-to-be said something which she could not remember, but that defendant became enraged and started attacking her husband-to-be. Defendant jumped out of the car in which they were riding and walked to their house, which was about a block away, and when she arrived home, defendant acted as if nothing had happened. She also testified to an incident where defendant was coming out of anesthesia and began thrashing around with "the strength of ten men." Defendant's mother, Marian Gacy, testified that defendant was an unhealthy baby and was not expected to live. She confirmed the incident where defendant took her silk underwear and hid it beneath the porch. She described an incident when defendant was approximately two years old where the father, for no apparent reason, punched her in the face, knocking out her bridge and causing her to bleed profusely. The father left, and when the police arrived they advised them to leave the home for a few days until things calmed down. When they returned, the father came home, ate dinner, and acted as if nothing happened. She described an inci-

dent where defendant apparently had had some type of seizure, and when he was revived he was fighting and kicking like a madman. Because defendant repeatedly passed out at school, he was told by Dr. John Cavanough that he should be sent to Cook County Hospital for psychiatric evaluation. Defendant told her: "Mom, don't send me to the psychiatric ward. I will be good." So she did not. She testified that her husband would go down to the basement and drink after work, and that he would talk to himself in two different tones of voice. She testified that her husband was very critical of defendant and never showed any affection towards him.

Carol Loftren, defendant's second wife, testified that she found silk bikini underwear, which were stained in front, lying around the house. She stated that defendant never hid the fact that he was bisexual. She said defendant was a gentle lover, but that throughout the marriage they had increasingly less sex, until one day defendant stated that this would be the last day that they had sex together. After they were divorced, they met in Wisconsin. At this time they tried to make love, but defendant began crying. Defendant "couldn't do anything" and "said he was afraid he was going more the other way." She stated that, one night when she could not sleep, defendant came home and was startled to find her up watching television. Defendant then stated he had come into the house to get something, but left with nothing, and when she looked through the curtains she saw a young boy with blond hair get into the car. Defendant then drove off. She went out to the garage and discovered a blanket on the floor, and a red light and a mirror on the wall. She testified that during the marriage she had complained of the terrible smell emanating from the crawl space; that one time she went away for a few days, and when she returned the smell had gone, and defendant stated that he had poured concrete in the

crawl space. She stated that defendant had a memory like an elephant and would be surprised if defendant ever forgot a face or a name. She stated that defendant planned to one day completely cement over the crawl space.

John Lucas, a gas station owner, testified that he serviced defendant's vehicles. He stated that, shortly before he was arrested, defendant came into the gas station and passed a bag with three rolled cigarettes to one of his employees. The employee showed Lucas the bag, and Lucas immediately turned the bag over to one of the policemen on the surveillance unit who was standing within 10 to 15 feet of them. Oscar Pernell, a prison guard, testified that one night after defendant was incarcerated, he saw him writing a letter. Two or three hours later, Pernell saw defendant lying underneath the bed with a towel wrapped around his neck. Pernell could not remember whether the towel was knotted or not, but he testified that no harm was done to defendant.

Other witnesses testified that defendant was boastful but not antisocial, that he was not a heavy drinker, and that he often had complained of physical ailments which did not appear to exist.

Two psychologists and two psychiatrists testified on behalf of defendant. Thomas Eliseo, a clinical psychologist, testified that defendant scored in the top 10% of the population on the Wechsler scale and had no major brain damage. However, he had confused thinking which "resembles to a large extent people who would be classified as schizophrenic ***." He diagnosed defendant as having borderline schizophrenia or borderline personality. When asked his opinion as to whether he was legally sane under Illinois standards, the People objected and a side bar was had. Outside the presence of the jury, it was established that Dr. Eliseo had not attempted to verify any of the facts that defendant had told him, read

the police reports, talked to any of the people involved, or read any of the reports of the other psychologists or psychiatrists. It was explained that defense counsel had asked him not to review these materials so that the doctor could give "an independent evaluation." The circuit court ruled that Dr. Eliseo could not base his opinion on defendant's statements, but Dr. Eliseo was allowed to answer a hypothetical question which included most of the pertinent facts concerning defendant's life which were shown by lay witnesses and defendant's confessions. Based on the facts and the hypothetical question, Dr. Eliseo stated that defendant suffered from a mental disease, paranoid schizophrenia, that this condition existed continuously and uninterruptedly in defendant between January 1, 1972, and December 21, 1978, and that because of this mental disease he lacked the substantial capacity to conform his conduct to the requirements of the law and appreciate the criminality of his conduct. On cross-examination, Dr. Eliseo stated that after defendant had committed the crime, he would understand that what he did was wrong, but at the times of committing the crimes, he was not aware of the criminality of his act. When asked how he could determine from one interview whether defendant was psychotic at certain points in time, Dr. Eliseo stated that he would determine the general personality characteristics and structure of defendant and then "project back. It is a guess." On further redirect examination, Dr. Eliseo was allowed to answer, in narrative form, the question: "Would you explain exactly how you came to the decision or opinion that the condition of paranoid schizophrenia existed for the last six, eight years?"

Dr. Lawrence Freedman reviewed all the police reports, all of defendant's statements, newspaper articles from the very inception of the case, defendant's criminal history, the reports from other psychiatrists and psychol-

ogists, and the book *Jeffrey Rignall* wrote concerning defendant's assault upon him. Dr. Freedman spent more than 50 hours examining defendant. Dr. Freedman also interviewed defendant's younger sister and his mother and spoke with the interviewers who were attempting to contact defendant's friends and neighbors. He reviewed all of the medical reports on defendant. Dr. Freedman diagnosed defendant as a pseudo-neurotic paranoid schizophrenic. Dr. Freedman explained that defendant had a psychotic core, but that this psychotic core was concealed by defense mechanisms which resemble neuroses. Dr. Freedman opined that defendant had neurotic and psychosomatic illnesses from early childhood, and that the shift from a serious neurosis to the beginnings of a psychosis probably occurred about the time of Christmas of 1969 when he was incarcerated at Anamosa for sodomy, and his father died and defendant was unable to go to his father's funeral. Defendant, Freedman explained, was at a very low point in his life, as he was a failure as his father had always predicted, and he would no longer be able to redeem himself. Dr. Freedman explained that during the homosexual encounters with his victims, he projected his own anxieties about himself onto his victims, thinking that they, and not he, were "trash." He stated that all the boys were in a certain age group and of a certain build because these boys represented the fit and trim build he was unable to attain as a youth. Dr. Freedman testified that his diagnosis was consistent with a diagnosis of borderline personality and that the schizophrenic process was at the borderline and "breaks out in flowered symptomatology from time to time when the stress gets too high." On cross-examination, Dr. Freedman stated that defendant could not control when the outcroppings would occur. When asked why these "outcroppings" only occurred at night and when no one else was around, Dr. Freedman explained that these

hours were the hours in which boy prostitution flourished, defendant was engaged in other activities during the rest of the day, and that defendant "was, in fact, concerned with not being detected." Dr. Freedman declined to give an opinion as to whether defendant was legally insane at the time of the murders, explaining that he believed the Illinois definition of sanity called for a legal conclusion, not a psychiatric conclusion.

Dr. Robert Traisman, a clinical psychologist, spent 3½ hours examining defendant and several more hours reviewing the results of the tests he administered to defendant. Dr. Traisman administered the Wechsler adult intelligence scale, the Bender-Gestalt visual motor test, the Rorschach ink blot test, the Draw-a-Person test, and the Thematic Apperception test on request by Dr. Richard Rappaport. Traisman noted that there was an unusual and significant disparity between defendant's verbal and nonverbal scores on the Wechsler test. Defendant's responses to the Rorschach test, Dr. Traisman explained, indicated that he was a paranoid schizophrenic who had homosexual conflicts, marked feelings of masculine inadequacy, a lack of feeling for other people, and an alarming lack of emotional control or ego control when under stress. Dr. Traisman noted that the defendant saw flowers in many of the ink blots and birds or insects which were entering in to siphon the pollen, a response which was inappropriate to the card. Dr. Traisman explained defendant's responses to the Thematic Apperception test and the Draw-a-Person test and explained how defendant's responses were consistent with his finding concerning the Rorschach test. For example, on the Draw-a-Person test, defendant was told he could draw anything he wished, and he drew his house in great detail. On cross-examination, Dr. Traisman agreed that it would be correct to say that defendant was a very severely disturbed man "but who reflects sufficient

awareness of any aggressive destructive behavior *** [and] *** knows the nature of any antisocial acts he might perform and *** would be quite cognizant of whether or not they are right or wrong on a moral level." On redirect examination Dr. Traisman stated that because of defendant's paranoid schizophrenia, he had a minimal amount of control over his actions and that his disease "is related to the acting out and loss of control ***."

Dr. Richard Rappaport, a psychiatrist, testified that defendant was "borderline" with the psychosexual disorders of fetishism, homosexuality, sexual sadism, and necrophilia. The "subtypes" of narcissistic and antisocial borderline personalities were also part of the same characterization. Dr. Rappaport testified that defendant would have brief psychotic episodes which would occur as a result of rage where "he thought these boys were him and he was the father" and the unmanageable rage he felt was actually against himself. Dr. Rappaport theorized that defendant placed the bodies in the basement because his father had placed "his junk or *** paraphernalia" down in the basement. Dr. Rappaport testified that defendant was sufficiently in touch with reality so that he realized that "he had to provide for his habits, he had to provide a receptacle for getting rid of those [shells] of people." On cross-examination, he stated that he used the psychoanalytic approach in examining patients and that there are a significant number of psychiatrists who neither use nor place reliance in this approach. When asked how to reconcile the fact that the last five bodies were thrown into the Des Plaines River with his theory that the dead bodies were "love objects," Dr. Rappaport conceded that this was difficult to explain, but that there would be some explanation that he had not yet come to understand. He stated that he did not believe that there was not a psychoanalytic answer

for the 33 murders committed by defendant. When asked whether defendant's explanations of why he murdered the victims, *e.g.*, because they asked for more money or threatened to reveal his homosexuality, were inconsistent with the theory of projection espoused by Dr. Freedman and Dr. Rappaport, Dr. Rappaport stated defendant may have "imposed those ideas on the individuals" or "tried to elicit behavior on their part to conform to his idea that they were bad people. That was part of the projective identification that I was explaining before." Dr. Rappaport consulted with Dr. Cornelia Wilbur, a known authority in the field of multiple personalities, and she confirmed his conclusion that this was not a case of multiple personality. Dr. Rappaport believed defendant spoke of "Jack Hanley" as an alias. On cross-examination, it was brought out that after these intense expressions of hostility, defendant could justify his behavior as conforming to his private code of morality, even though he recognized that his behavior would not be considered socially acceptable. He stated that defendant's antisocial personality helped him forget his criminal acts.

In rebuttal, the State presented witnesses who testified to homosexual attacks and encounters with defendant while he was living in Iowa. R. E. Schroeder testified that defendant had hired him to beat up Donald Voorhees, defendant's Iowa sodomy victim, so that he would not testify in court against defendant. Richard Westphal, who worked for defendant when defendant was the manager of several Kentucky Fried Chicken stores in Iowa, testified that defendant allowed him to sleep over at his home one night, that defendant told him he would sleep with his wife in exchange for a "blow job," that defendant's first wife came in to the room where he was sleeping and made love to him, and that defendant walked in and stated, "See, I caught you, now

you owe me a blow job." Defendant then forced Westphal to comply with the agreement. Edward Lynch, a classmate of Donald Voorhees, testified that while he was at defendant's house in Iowa defendant threatened him with a carving knife and forced him into his bedroom. Lynch overpowered defendant, and defendant became very apologetic, bandaged Lynch's cut, and talked Lynch into watching a "stag film" downstairs. While watching the movies in the basement, defendant said, "Let me try something," and chained Lynch's hands behind his back. He then moved behind Lynch, forced him onto a nearby mattress, and choked him until he stopped moving. While Lynch was lying still, defendant rolled him onto his side, and unlocked his hands. When Lynch got up, defendant said, "Well, are you okay?" and then at Lynch's request, took him home.

The People presented several witnesses who described defendant's conduct while incarcerated at Anamosa in Iowa. These witnesses testified that defendant functioned very well while in prison, that he was able to attain positions of importance in organizations such as the prison chapter of the Jaycees, and, because of his work in the prison's kitchen, was able to trade food for favors. Defendant told his counselor, and other inmates, that he was in prison for showing porn: films to adolescents, and showed disdain for homosexuals. These witnesses also recounted that defendant experienced episodes of what appeared to be heart attacks.

Steve Pottinger, a former friend of defendant's from Waterloo, Iowa, testified that there was no change in defendant's behavior before and after he was in the penitentiary. Charles Hill, another friend from Waterloo, Iowa, testified that while defendant was in prison he vigorously professed innocence to the crimes with which he was charged, and when he was released stated, "I'll never go back to jail."

Robert Donnelly testified that he was walking in Chicago when defendant approached him in his black car (which had spotlights on both sides) and asked for identification. Thinking that defendant was a policeman, Donnelly approached the car. Defendant threatened Donnelly with a gun and told him to get into the car. Donnelly was then handcuffed and told to lie on the floor of the car. Defendant brought Donnelly into his home, into a room which had a bar, and told Donnelly that "he was an important person" and that "still he didn't get the respect he deserved ***." Defendant offered Donnelly a drink, and when Donnelly refused, defendant threw the drink in his face. Defendant later offered another drink, which Donnelly refused, and defendant told him that he was a guest and that he should accept defendant's hospitality, and then held Donnelly's mouth open and poured the drink down his throat. Defendant then took the handcuffs off, asked Donnelly for his wallet, examined the wallet, and then told him to put the handcuffs back on. After he did, defendant slapped Donnelly with the back of his hand, shoved Donnelly on the couch, and grabbed his hair. When Donnelly screamed, defendant pushed his face into the couch. He then removed Donnelly's pants and anally raped him. Donnelly passed out. When he regained consciousness, defendant took him into the bathroom, shoved Donnelly's head against the wall, then placed something around Donnelly's neck and started twisting it. He told Donnelly, "My, aren't we having fun tonight?" He then forced Donnelly's head into the bathtub, which was filled with water, and held it there until Donnelly passed out. When Donnelly regained consciousness, he discovered that his clothes had been removed and the handcuffs had been moved so that his hands were now cuffed behind his back. Defendant held Donnelly's head under water again until he passed out, and when he regained consciousness he repeated this

procedure once more. When Donnelly again regained consciousness, defendant urinated all over Donnelly. He then showed Donnelly nude magazine pictures of girls, asked him if he liked them, and when Donnelly said yes, told Donnelly that he was sick. Defendant then punched Donnelly, and once again held his head in the bathtub until he passed out. When Donnelly again regained consciousness, defendant picked him up from the bathroom floor and brought him back into the room with the bar. He said, "You're just in time for the late show" and turned on a projector and showed a "gay" pornographic film on the wall of the room. After the movie, defendant stuck his foot in Donnelly's stomach, put a gun to Donnelly's head, and played "Russian roulette." He pulled the trigger between 10 and 15 times, spinning the chamber between pulls of the trigger, until the gun finally went off. The gun contained a blank. Defendant told Donnelly that he had killed girls before, but that he had stopped doing this, because he found killing "guys" to be more interesting. He then choked Donnelly until he lost consciousness. When Donnelly regained consciousness, his hands were cuffed behind his back, his ankles were bound, and there was a gag in his mouth. Defendant then inserted some sort of object into Donnelly's rectum and he passed out. When he regained consciousness, the object that was placed in his rectum was still there. When Donnelly regained consciousness, defendant removed the gag from Donnelly's mouth and Donnelly told him that if he was going to kill him, to just do it and get it over with. Defendant placed the gag back in Donnelly's mouth, and started "playing around with" the object which was inserted in Donnelly's rectum. Defendant then told Donnelly to dress, put Donnelly in his car, and told him it would be his last ride. He asked Donnelly "How's it feel knowing that you're going to die?" but then released Donnelly near Marshall Field's, where

Donnelly worked. He told Donnelly that he was going to die later, but not to tell anyone, because they would not believe him.

Officer Ted Janus was assigned to Donnelly's case. When Janus arrested defendant, he advised him that he was under arrest for kidnaping and deviate sexual assault. At Area 6 police headquarters, after twice being advised of his rights, defendant told Janus that he had offered Donnelly a ride, that while riding together the conversation turned to performing sex acts for money, to which Donnelly agreed, that they went to defendant's house, performed "slavery sex" "where they bound each other with handcuffs and chains, watched pornographic movies, committed acts of deviate sexual assault upon each other and used candles and dildos, also." Defendant told Janus that he then drove Donnelly to Marshall Field's, his place of employment, but did not pay Donnelly the money.

The People's experts all testified that defendant was suffering only from a personality defect, that he was never psychotic, and that he was legally responsible for his criminal acts under the Illinois standard.

Dr. Leonard Heston, currently Professor of Clinical Psychiatry at the University of Minnesota, testified that while at the University of Iowa he examined defendant in 1968 pursuant to court order issued on a joint application of defendant and the State of Iowa. At that time he was diagnosed as having antisocial personality. Dr. Heston opined that the diagnosis "pseudo-neurotic paranoid schizophrenic" was not a recognized diagnosis and "is not taken very seriously right now." Dr. Heston found that there was "grossly insufficient evidence to support" the psychoanalytic scenario concerning how defendant went about committing these killings," and that the diagnosis of paranoid schizophrenic was based on "pure inference." Even assuming that Dr. Freedman's clinical

findings were correct, Dr. Heston explained, Dr. Heston still would not be able to conclude that defendant could not conform his conduct to the requirements of law, because he was unable to find a causal link. He testified that "borderline" appeared for the first time in psychiatric nomenclature in Diagnostic Statistical Manual III (DSM III), that the diagnosis was quite controversial, and that "it is our single outstanding problem." He stated that the purpose of DSM III is to allow psychiatrists to understand each other. He testified that the problem with psychoanalytic theory is that it requires an inference about mental processes which is not susceptible to proof. He explained that if the theory was correct, it should lead to treatments which work, but since effective treatments had not resulted from the theory, the theory was not correct.

Dr. A. Arthur Hartman, a clinical psychologist, was called to examine defendant by Dr. Robert Reifman, a psychiatrist, at the inception of the case due to the seriousness of the charges. He diagnosed defendant as having an antisocial personality. Dr. Reifman diagnosed defendant as having a personality disorder—narcissistic type. He explained that the description of narcissistic personality contains many of the elements of the antisocial personality, and that the antisocial personality is a subtype of narcissistic personality. Dr. Reifman explained that psychoanalysis was a theory of behavior, a form of research, and a form of treatment, but that it "is not related to legal responsibility at all." Dr. Reifman stated that defendant could not be a pseudoneurotic paranoid schizophrenic because if he had such a defect he would have so many symptoms that he would be "an extremely impaired person" and would be "bothered in every area of his life." He ruled out the possibility of 33 brief psychotic episodes because, "in each instance that I am aware of, at no time was Mr. Gacy out of touch with reality." He explained that the process of tricking his victims into the handcuffs and tying intricate knots on the ligatures used for the "rope trick" required "cognition, thoughtfulness, reasonable behavior." Dr. Reifman did not believe that defendant's speech was characterized with "loose associations," but rather was the result of his overt lying. He stated that defendant was feigning being crazy, and attempted to fake a multiple personality defect. When asked on cross-examination whether defendant was indistinct or contradictory, Dr. Reifman replied: "He tries to obfuscate, or tries to present a picture that is not clear." Dr. Reifman explained that the difference between a diagnosis of antisocial personality and a diagnosis of narcissistic personality is the difference in emphasis, and that he found that the diagnosis of antisocial personality did not take into consideration defendant's accomplishments in other areas.

Dr. Richard Rogers, a clinical psychologist, administered the Schedule of Affective Disorders and Schizophrenia test (SADS) on defendant. He stated that this test was relatively new and not currently in widespread use, but that reliability studies showed that experts agreed on their diagnoses of the same patient 88% of the time. Dr. Rogers explained that in regard to the MMPI test administered by Dr. Eliseo, there was evidence that defendant was attempting to make himself look worse than he really was. Dr. Rogers testified that there were empirical studies which proved that the Draw-a-Person test does not work, and generally disparaged the interpretation of other test results which Dr. Traisman reached.

Dr. James Lewis Cavanaugh, a psychiatrist, testified that, when he went to interview defendant, defendant insisted that he sign a document which precluded the use of his notes by the court or by lawyers. Dr. Cavanaugh stated that this indicated a degree of sophistication, and

that defendant insisted that the experts had to play the game by his rules. He expressed the opinion that defendant was suffering from pervasive narcissism, with an obsessive compulsive quality, an antisocial quality, and a hypomaniac quality, all of which were components of his mixed personality disorder. Dr. Cavanaugh, who used an eclectic approach to psychiatry, believed that the psychoanalytic approach was useful in diagnosing the cause of a patient's problem, but that the approach was not useful in assessing criminal responsibility. Dr. Cavanaugh explained that the psychoanalytic approach was "highly deterministic" in that it is premised on the belief that certain types of behavior patterns, thoughts, feelings, or fantasies could be predicted by reconstruction of past experiences. Dr. Cavanaugh further explained that there was an inherent conflict between a determinant psychological theory which explains everything on the basis of a person's earlier development and a legal system premised on the concept of free will. Legally, Dr. Cavanaugh explained, a person could escape responsibility only when "an extreme situation arises" where the person's ability to form an intent is questioned. Dr. Cavanaugh ruled out the possibility of schizophrenia because defendant's general level of functioning was too high and because "the sum total of his life up to this point in time" negated the existence of the basic elements of schizophrenia. On cross-examination, Dr. Cavanaugh explained that he had used psychoanalytic theory to explain the causes for defendant's behavior, and that defendant was suffering from a major psychiatric disorder. Dr. Cavanaugh expressed the opinion that defendant understood his behavior sufficiently to control it, or at least get help, but Dr. Cavanaugh conceded that defendant's ability to control his behavior was impaired in the sense that it was below that of the average person.

The defense called two other psychiatrists, Dr. Tobias

Brocher, a neurologist and a psychiatrist, agreed with Dr. Rappaport's theory that parts of defendant "split off" and he projected these bad parts onto his victims, and then destroyed the victims, believing he was doing a service to society by ridding it of "human trash." Because the "splitting off" process and projection of a repressed part is an unconscious process, Dr. Brocher opined, "My diagnosis proves the psychotic process because only persons who are psychotic can split off so far that they negate reality." Dr. Brocher did not state an opinion whether under Illinois standards defendant was responsible for his criminal acts. On cross-examination, Dr. Brocher was asked if he realized that the "reason for the motive that someone does something has nothing to do with [the Illinois] standard [for insanity]?" Dr. Brocher replied: "Well, that's maybe a legal viewpoint; it's not a psychiatric viewpoint, because in psychiatry you have to understand the motivation why somebody is doing something. Otherwise, he can't understand any kind of illness." When asked whether he agreed with the statement to the effect that psychiatrists do not belong in the courtroom because they could not function effectively in a courtroom, Dr. Brocher replied, "*** my experience *** convinced me the opposite is true, that most people in the legal profession don't understand psychiatry." Dr. Helen Morrison, a psychiatrist, diagnosed defendant as having a mixed psychosis or an atypical psychosis. Dr. Morrison believed that defendant suffers from psychological hallucinations where he would see parts of him which were split off in his victims. She was of the opinion that defendant was not legally responsible for his actions under the Illinois standard, and that defendant would have killed his victims even if a police officer had been present at the time of the murder.

In rebuttal, Dr. Jan Fawcett, a psychiatrist, also opined that the problem with psychodynamic or psy-

choanalytic theory in determining criminal responsibility is that it was used to explain behavior retrospectively as if no other outcome could occur. Additionally, he explained, the psychodynamic theory tends to be used as if it is actual fact when it is really inference and theory, and inferences or assumptions upon which psychodynamic theory is based do not in themselves explain an individual's behavior in the sense of causation. When questioned concerning Dr. Brocher's diagnosis, Dr. Fawcett explained why he disagreed with that diagnosis, and also explained that even if this diagnostic evaluation were to be accepted, there still was no causal relationship between his diagnostic theory and any possible inability of defendant to either appreciate the criminality of his conduct or conform his conduct to the requirements of law. When questioned concerning Dr. Morrison's diagnosis of atypical psychosis, Dr. Fawcett found no factual basis, and that the term "psychological hallucination," in his opinion, did not meet the criteria for the type of hallucination that is used in the criteria for the diagnosis of a psychosis.

Defendant contends that the People failed to prove beyond a reasonable doubt that defendant was sane at the time of the alleged offenses. Defendant argues that "the defense evidence on the sanity question was by and large consistent and credible, while the State's evidence was contradictory and unconvincing ***." Defendant, in his brief, examines at length both the expert and lay testimony concerning defendant's insanity defense and concludes that because all the defense experts arrived at consistent diagnoses, and the People's experts did not, the People failed to meet their burden.

The People argue that defendant has offered no evidence which raises a reasonable doubt as to his sanity at the time of the alleged crimes; "that even assuming that the issue was adequately raised, the proof of Gacy's sanity during the murders was overwhelming; and that as a matter of law, the jury's determination should not be disturbed."

There is little conflict in the evidence, and the question presented was what inference could appropriately be drawn therefrom. " 'The record presents a question of fact to be determined by *** [the fact finder]. Its decision will not be reversed unless the determination is so improbable or unsatisfactory as to raise a reasonable doubt as to defendant's sanity.' " (*People v. Carlson* (1980), 79 Ill. 2d 564, 580, quoting *People v. Ward* (1975), 61 Ill. 2d 559, 568.) On this record the jury was not required to draw the inference that defendant was insane, and the evidence amply supports the verdict.

Defendant contends next that the circuit court erred in its ruling "that expert witnesses for the State would be allowed to recount statements made to them by John Gacy, but that defense expert witnesses could not do so ***."

In determining that an expert psychiatrist or psychologist may be precluded from repeating a defendant's self-serving statements, the circuit court relied primarily on *People v. Hester* (1968), 39 Ill. 2d 489. In *Hester*, a defense psychiatrist was precluded from giving his opinion "of the defendant's susceptibility to a dictated confession which would have been based on a complete case history given by [defendant] to the psychiatrist during their second interview." (39 Ill. 2d 489, 509.) The court, noting the rule that only treating physicians could testify "as to [their] medical opinions based upon subjective symptoms described by the patient," held that it was not an abuse of discretion for the trial court to so limit the psychiatric testimony. Noting that "doubt is cast upon the trustworthiness of the patient's statements" when those statements are made to an examining expert in contemplation of trial, and that "most courts refuse to

permit the physician to act as the patient's conduit for narrative declarations," the court found no reversible error. In *People v. Noble* (1969), 42 Ill. 2d 425, 432-35, the court held that psychologists could testify as to the psychological tests they administered, such as the Bender visual motor test, the Rorschach test, and the Thematic Apperception test, and could testify as to the results of those tests. The court reasoned, *inter alia*, that since psychiatrists used psychologists as one of their "tools" for diagnosing a patient, it would be an anomaly to refuse to allow the psychologist to explain the nature of the tests administered by him and the results of those tests. 42 Ill. 2d 425, 435-36.

There are authorities which hold that the statements made by the accused to the examining psychiatrist should be admitted. (See 2 Wharton, Criminal Evidence sec. 312 (13th ed. 1972); *United States v. Baird* (2d Cir. 1969), 414 F.2d 700.) The rationale as stated in *State v. Whitlow* (1965), 45 N.J. 3, 15-19, 210 A.2d 763, 769-71, is:

> "It is obvious, even to the layman, that in all probability a psychiatrist would require more than a mere physical examination of a defendant in order to reach a conclusion of his sanity or insanity. The very nature of the psychiatric study would seem to call for utterances or answers through conversation with the alleged incompetent. The psychiatric interview is the basic diagnostic tool. ***
>
> * * *
>
> There seems to be a tendency elsewhere in insanity cases to allow the defense psychiatrist to recount the full history obtained from the defendant regardless of its hearsay or self-serving quality, so long as the doctor regards it as essential to the formulation of his expert opinion. If he so regards the history, the test of admissibility is satisfied. The thesis is that such conversations with and statements by the defendant, whether or not they relate to the crime itself, are verbal acts, circumstantial evidence for or against the claim of insanity. They do not come in as evidence of the truth of the facts asserted but rather, and only, as part of the means employed by the doctor in testing the accused's rationality, mental organization and coherence. They are object-like factors used to ascertain mental abnormality or the reverse."

We need not, however, decide the question here for the reason that our review of the record shows that defendant's experts were not precluded by the circuit court's ruling from stating, or explaining to the jury, the basis for their conclusions. As the circuit court noted, "as a practical matter, your statements [defendant's statements to defendant's experts] are actually going in anyway ***."

The circuit court's first application of its ruling that defendant's experts could not testify to "self-serving" statements made by defendant occurred during the testimony of Dr. Eliseo. Dr. Eliseo had been asked by defense counsel to examine defendant and make a diagnosis without reviewing any of the information thus far gathered in the case, ostensibly for the reason that they did not wish him to be "prejudiced" by this information. Dr. Eliseo was, however, permitted to give his opinion based on a hypothetical question propounded by defense counsel, and thus expressed his opinion to the jury. In any event, Dr. Eliseo was permitted to explain in narrative form "exactly how [he] came to the decision or opinion that the condition of paranoid schizophrenia existed for the last 6, 8 years."

Dr. Freedman, whose qualifications spanned over 30 pages of transcript, reviewed defendant's statements in explaining his diagnosis to the jury. After stating his diagnosis, Dr. Freedman explained how he reached his conclusions. He was allowed to testify, without objection, that defendant described to him the conditions under which Robert Piest was killed and that while describing

this murder in great detail he showed no "ordinary manifestations of human feeling," that defendant exhibited a "certain amount of pride" in being able to use his cunning to overcome the strength of the "young and stupid" "muscular youths," and that defendant was very disturbed by the fact that Dr. Freedman's books were piled up in his office in a disorderly fashion. While Dr. Freedman was not permitted to testify as to defendant's exact statements without quoting defendant directly, he explained the contents of those statements. He testified concerning defendant's anxiety regarding his sexual identification and his anger at being called a homosexual, and that defendant showed no emotional affect when he described the stabbing of his first victim.

Dr. Traisman described defendant's response to the various tests he administered. Dr. Rappaport testified that he administered sodium amytal to defendant to induce a deep hypnotic condition. While Dr. Rappaport was precluded from testifying concerning defendant's description, while under the influence of this drug, of his early life he testified that defendant had not told him any "new memories" that he had not told "in his waking state," but that he had described events in greater detail. Although Dr. Rappaport was precluded from testifying concerning statements made by defendant about his life history or why he behaved in a particular manner, he explained, in a narrative form, defendant's developmental history as compiled in police reports and interviews with defendant's relatives and childhood friends and how events have influenced his development. Dr. Rappaport testified concerning speech patterns which demonstrate "loose associations" or inappropriate affect, and despite objections by the prosecution, in many instances Dr. Rappaport repeated defendant's statements to him.

Defendant asserts that defense counsel were required to bring out defendant's statements in cross-examination

of the People's experts because they "had to keep in mind that the judge had repeatedly ruled that the State experts could refer to statements made by the defendant to justify their conclusions." Appellate counsel concedes, apparently, that defense attorneys were permitted to bring out "during cross-examination those statements made by Gacy to the State experts which tend to contradict or rebut their conclusions." Defendant concludes, however, that the State experts were allowed to explain their conclusions, but the defense experts could not. Defendant asserts that there is no way of determining the stifling effect the judge's ruling had on the defense experts.

The record does not support defendant's assertions. The record is replete with examples of defendant's experts explaining the bases of their determinations although not quoting verbatim his statements. Moreover, defense experts were able to explain how the events of defendant's childhood and adolescence, as corroborated by numerous friends and relatives of defendant, affected defendant's development. Because no offers of proof were made concerning the testimony which would have been elicited from defendant's experts, it is impossible to determine the adverse effect, if any, of the alleged error.

Defendant next asserts that he was denied his fifth amendment right against self-incrimination when his statements to the People's experts were disclosed to the jury. Defendant argues that the jury was not instructed that it could consider these statements only as to defendant's mental state and that, even if such an instruction were given, it would "inevitably be ineffectual, and that the defendant's rights can therefore only be protected by a blanket rule prohibiting experts from recounting the defendant's statement." We consider this contention to be without merit. We note that it was defendant who sought to introduce these statements into evidence. Fur-

thermore, since there was no question at trial other than defendant's sanity, no prejudice could have occurred. Defendant, in his reply brief, asserts that he never abandoned his claim of innocence because "at jury selection and at the time of jury instructions the jury was informed that there were two issues to be resolved: guilt and sanity." This contention is difficult to accept in light of defense counsel's statement in opening argument that the insanity defense "is the only defense that we could use here," the defense experts' admission that defendant had committed the acts, and the lack of any evidence in the record which would tend to dispute the charge that defendant had committed the murders.

Defendant also argues that failure to instruct the jury that defendant's statements to the People's experts could be used only with regard to the issue of sanity deprived him of a fair sentencing hearing, because many of the statements could be used as factors in aggravation. This issue was waived. Not only did defendant fail to object to the use of these statements, he stipulated to their use and, at least in part, relied on them in arguing that his mental defect constituted a factor in mitigation which should preclude the death penalty. To review this issue would permit defendant to inject error into his own case. Appellate counsel's suggestion that trial counsel's failure to pose an objection is indicative to incompetence of trial counsel is also without merit. Not only was the emphasis of this mitigating factor an acceptable choice of trial strategy, it appears to have been the only strategy available to trial counsel.

Defendant next argues that his fourteenth amendment right to due process was violated because Dr. Cavanaugh testified that if defendant were acquitted it would be impossible to guarantee that he could be confined to a hospital for the rest of his life. At *voir dire*, defense counsel requested that prospective jurors be in-

structed concerning civil commitment. As previously noted, defense counsel, in opening argument, twice suggested that defendant should be committed to a hospital for the rest of his life. During direct examination of Dr. Cavanaugh, the assistant State's Attorney asked, without objection, whether it was possible to guarantee confinement in a mental hospital for the rest of a patient's life. Dr. Cavanaugh stated that it was impossible to guarantee confinement in a mental institution because the legal standards for confinement to an insane asylum were constantly changing. Defense counsel objected, a side bar was had, and the court told defense counsel that the objection was not timely. The court stated that it thought that defense counsel wanted to "try [the answer] out for a while" and interposed an objection only when it became obvious that the answer was unfavorable to defendant's case. The circuit court ruled that nothing further should be said on the matter. Despite this, defense counsel asked Dr. Cavanaugh whether defendant, if he were acquitted, could be civilly committed. Dr. Cavanaugh testified that he could not if the law were followed. The court stated that neither side could raise an irrelevant issue and instructed the jury to disregard the colloquy because it was irrelevant to the issues of the case. The question raised could serve only to divert the jury's attention from the issues in the case (*People v. Yates* (1983), 98 Ill. 2d 502, 539), and the court correctly instructed the jury to disregard the testimony and the comments. On this record the instruction was sufficient to render harmless any effect which the testimony may have caused, and we find no error which warrants reversal.

Defendant contends next that the circuit court erred in permitting certain experts to testify that they had found defendant fit to stand trial. Several of the experts were permitted to testify that they had found defendant

fit to stand trial, and in each instance the witness also explained the difference between fitness to stand trial and the insanity defense. The People argue that an expert's finding that the defendant was fit to stand trial was relevant to the question of defendant's sanity at the time of the crime. While there may be instances where such evidence is relevant, we fail to see its relevance here. We hold, however, that the introduction of this evidence did not constitute reversible error. The defense theory was that defendant was able to function well in society except when stress levels rose so high that he experienced something akin to a psychotic episode and that defendant was fit to stand trial was consistent with his defense. Since the difference between fitness for trial and sanity was clearly and repeatedly explained to the jury, we do not believe that the jury was confused by the introduction of this testimony and the error was harmless.

Defendant next complains of three instances where counsel was allegedly improperly restricted in his examination of several experts. First, defense counsel asked Dr. Rappaport a series of questions concerning how "substance use disorders" fit into Dr. Rappaport's diagnosis. Objections were sustained to any questions concerning substance use or substance use, apparently for the reason that there was no evidence of this in the record. We find, however, that the [illegible] if any, was harmless for the reason that objections to the questions were sustained after Dr. Rappaport answered them. Furthermore, Dr. Freedman testified concerning large intakes of valium, alcohol and mescaline which accompanied the episodes where the "most acute and dangerous paranoia" emerges. The jury was informed that Dr. Cavanaugh's and Dr. Fawcett's reports referred to alcohol and drug abuse. Second, defendant asserts that the circuit court erred when it refused to permit defense counsel to question Dr. Hartman concerning whether he had diagnosed anyone as "borderline" in the previous 28 years. We agree with the People that this question was improper. The testimony shows that "borderline personality disorder" was given that designation for the first time in DSM III (Diagnostic Statistical Manual III), which was approved and adopted by the American Psychiatric Association while this case was being tried. While defendant asserts in his reply brief that "borderline personality" is only a new label for a diagnosis which has existed for a long time, and Dr. Hartman could have explained this, we are of the opinion that the objection to the form of the question was properly sustained. The question specifically asked if Dr. Hartman had diagnosed anyone in the last 28 years as "borderline." If defense counsel wished to inquire whether Dr. Hartman had ever diagnosed a patient using one of the previous labels for this condition, he could have done so. Third, defendant complains because he was not allowed to ask Dr. Hartman:

> "In a borderline, a person suffering from borderline personality organization manifests many, many characteristics of the sociopath, isn't that right?"

We agree with the People that his question was vague and ambiguous. Defense counsel could have questioned the expert as to particular symptoms and then asked if that was consistent with the diagnosis of "borderline." It was not improper for the circuit court to preclude the asking of the question which might require a variety of answers depending on how it was interpreted. We conclude that these three alleged errors, in a transcript containing more than 5,500 pages, could not have deprived defendant of a fair trial.

Defendant next argues that it was improper for Dr. Garron, called by the People, to state an opinion concerning whether defendant suffered any nonorganic

brain disorders when he had been asked as a neuropsychologist to examine defendant for the purpose of determining whether there were any organic brain disorders. Defendant argues that an expert may not state an opinion when there is no factual basis to support his finding, and since Dr. Garron specifically testified that he was not asked to examine defendant for nonorganic brain disorders, no factual basis existed. The People argue that there was a factual basis for his opinion since Dr. Garron administered a Rorschach test, that Dr. Garron had used this test to evaluate defendant's "mood, emotional state, and emotional organization," and that in any event Dr. Garron's testimony was admissible to rebut Dr. Traisman's statement that any experienced clinical psychologist would interpret the results of a Rorschach test in the same manner. We need not address all these assertions, as we find that Dr. Garron had a sufficient factual basis for his opinion. The Rorschach test was used by almost every expert testifying in this trial, and each expert testified that it was useful to some degree in formulating a diagnosis. The fact that this was the only test given which related to nonorganic brain damage and that Dr. Garron did not examine defendant for the purpose of diagnosing nonorganic brain disorders affects the weight, not the admissibility, of his testimony.

Defendant next argues that the People improperly impeached Dr. Freedman. Dr. Freedman did not state an opinion whether defendant was legally insane at the time of the crimes because he believed that such a determination was outside the field of his expertise. On cross-examination, Dr. Freedman stated that he had given such an opinion in the Simon Peter Nelson case. On redirect examination, Dr. Freedman stated that he gave an opinion in that case because he was with Mr. Nelson and saw "a total reenactment under my eyes of a dissociated state by psychotic episode in which this man killed his

beloved six children ***." Defense counsel asked if he actually witnessed this, and Dr. Freedman replied: "I have, the tape which I have played to many experts, and no one doubts ***." On re-cross-examination, the following colloquy occurred:

> "Q. The jury doubted you, didn't they?
> A. I don't think so.
> Q. They found him guilty didn't they?
> MR. AMIRANTE: Objects to.
> THE WITNESS: And they advised the judge against capital punishment because of his emotional state."

The objection was sustained and the court instructed the jury:

> "Ladies and gentlemen, what happened in another case certainly won't help us decide this case, so any reference to results of another case is improper consideration."

The People argue that this was proper impeachment because the jury could have inferred that what "no one doubted" was that Dr. Freedman was correct in his opinion concerning whether Simon Peter Nelson was legally sane or not, and not whether he was with Nelson when he had a recurrence of his psychotic episode. We find it unnecessary to address this question, because even if this alleged impeachment were improper, it was not damaging to defendant's case. From the fact that the jury in that case had found Nelson guilty but advised against capital punishment because of defendant's emotional state, the jury in this case would no doubt infer that the jury in that case believed that Dr. Freedman's observation of the psychotic episode was indeed correct. Additionally, a cautionary instruction was immediately given and the jury was instructed to disregard the entire line of questions.

Defendant also complains that the People improperly bolstered Dr. Cavanaugh's testimony. During the People's case in rebuttal, the following colloquy occurred:

"MR. KUNKLE: Q. Now, with respect to the [Isaac Ray Center] statistics, did you in fact keep statistics and publish them in your first annual report at that time, 35 evaluations having been completed through the court system?

You keep statistics as to any correlation with your decision as to what the ultimate factfinders find?

A. Yes. In that first annual report, the coefficient correlation which really means the degree of agreement between our opinion and the factfinder, the judge or jury's opinion was .8, which basically means eight out of ten times our finding—

MR. MOTTA: Objection to this, Judge.

THE COURT: Objection sustained."

Defendant concedes that an objection was sustained, but that the damage to the defendant is so great that the error cannot be considered harmless. The People respond that in this case the evidence was relevant since "the validity and reliability of various schools of psychiatric diagnosis were attacked by both sides" and that "any information on the reliability of Dr. Cavanaugh's technique was a proper matter for the jury's consideration." We agree with the circuit court that what other juries decide in other cases is not relevant and that the percentage of diagnoses accepted by the finder of fact is not necessarily indicative of the reliability of that expert's techniques. It was within the province of the trial court to determine that whatever probative value this information had was outweighed by the danger of the defendant's being convicted by statistics rather than by the evidence in the case. In view of the sustained objection, we hold that defendant was not prejudiced.

Defendant next argues that the People's cross-examination of Dr. Rappaport was improper. At the beginning of the cross-examination of Dr. Rappaport, the following colloquy occurred:

"Q. Let me ask you this: did you or anyone from your

office call more than one television station last night—

MR. MOTTA: Objection, Judge.

MR. KUNKLE: Q. —indicating your willingness to be interviewed in the midst of your testimony?

A. No.

Q. You didn't?

A. No.

Q. You didn't walk out here in the hall with the press people and indicate that you were available for interviews?

MR. AMIRANTE: Objection: Judge, he was—

THE WITNESS: A. No.

MR. AMIRANTE: —with me when he walked out, we didn't talk to the press."

The circuit court immediately instructed the jury that it was not to imply that this in fact occurred. Later, at a side bar, the court asked Dr. Rappaport if he had attempted to contact the news media in any way. Dr. Rappaport explained that he had not contacted the news media nor did he know of anyone who had. Defense counsel insisted that the jury could draw an inference from the prosecutor's question that Dr. Rappaport had violated the court's order forbidding attorneys, experts and other parties from talking to the press about the case. The assistant State's Attorney stated that he had the name of an "interviewer" who was told by Dr. Rappaport that he was available for an interview, but would not disclose the name unless instructed by the court to do so. Acknowledging that the People would have to call these newsmen on rebuttal, and that there might be some problem with "the newsmen privilege," the court ruled: "I feel that it is on such an insignificant point that it would not be worth the legal ramifications of attempting to put in that rebuttal, so I would instruct the State not to put in that rebuttal, and I will instruct the jury to disregard anything regarding that." The court then instructed the jury to disregard any remarks concerning

this matter.

Citing *People v. Stephens* (1972), 51 Ill. 2d 268, 276, and *People v. Pfanschmidt* (1914), 262 Ill. 411, defendant argues that a witness may not be impeached on a collateral matter and that "the test of collateralness is whether the fact for which the testimony is offered in contradiction of a witness' testimony could have been shown in evidence for any purpose independent of the alleged contradiction." Citing *People v. Pumphrey* (1977), 51 Ill. App. 3d 94, defendant argues if the sole purpose of the impeaching evidence is to contradict the witness and if it is not relevant for any other purpose, it is inadmissible.

We note that it was defense counsel who injected the issue of bias of the expert witnesses into this trial with the remarks in opening argument that the People's experts were "mechanics for the State" or had "inflexible biases." The People's response to this bias argument, at least as far as Dr. Rappaport is concerned, appears to be that, as a private practitioner, Dr. Rappaport would rely heavily on defense attorneys and criminal defendants for business. The witness' use of this trial for publicity would be relevant to the inference that he had a motive to testify for the defense. The People had the right to cross-examine the witness concerning his bias, prejudice or interest in the outcome of the suit (*People v. Sompson* (1953), 1 Ill. 2d 399, 404), but we agree with the circuit court that the matter was insignificant and, in view of the instruction to the jury to disregard it, was not prejudicial.

Defendant contends next that the People improperly insinuated that defense counsel and defendant had concocted the insanity defense the night before defendant's arrest. On direct examination of Detective Michael Albrecht, the following colloquy occurred:

"MR. KUNKLE: He said he had four Johns and he doesn't know all of the personalities.

Q. Now, this was after he had been to his lawyers' the night before, is that right?

A. That is correct."

Defense counsel immediately objected and asked for a side bar. Mr. Amirante stated: "That's a direct attack on defense counsel's integrity. It calls for a mistrial, I'm making a motion for mistrial." The court stated: "I myself didn't interpret it that way. Number 1, he goes to his lawyer, it doesn't necessarily follow that the lawyer is suggesting he's going to a lawyer and he's coming up with this." Defense counsel insisted that the insinuation was "obvious," and the court reiterated that it did not necessarily interpret the question in that manner and that "it better not be argued that way" and that the assistant State's Attorney "better tell whoever is going to argue not to argue that." We cannot agree with defendant that the People's questions admit to only one inference. The People did not argue that Mr. Amirante concocted the multiple-personality defect and told defendant to use it. The People were entitled to argue, however, that defendant's visiting his attorneys the day before he was arrested and telling the police that there were "four Johns" tended to establish that defendant had concocted the multiple-personality defect and was attempting to use it to avoid responsibility for his crimes.

Defendant cites *United States ex rel. Macon v. Yeager* (3d Cir. 1973), 476 F.2d 613, 615-16, and other cases, and argues that the People's reference to defendant's exercise of his right to counsel is a violation of the sixth amendment. In *Yeager*, the defendant, after a shooting incident, drove away from the scene with his friends and instructed his friends "to give no statements and to take no action until he had consulted his attorney." (476 F.2d 613, 614.) The next morning he telephoned his lawyer

and was later arrested. During closing argument, the prosecutor argued:

> "He goes home and puts the shirt down in the chest, a torn shirt. Then he goes to bed. He says he had trouble sleeping. He gets up the next morning and is scared beyond, what does he do? He calls his lawyer. *These are acts of consciousness!* (Emphasis added.)" (470 F.2d 618, 614.)

We find *Yeager* distinguishable. In *Yeager*, the prosecutor argued to the jury that they could infer defendant was guilty because he consulted his attorney after the alleged criminal act had occurred. Here, however, the inference which the assistant State's Attorney was asking the jury to draw was that defendant's consultation with his attorneys prior to making statements to police concerning multiple personalities supported the experts' conclusions that defendant was attempting to fake an insanity defense. That he confessed to 30 murders also supports the inference that he was aware that his conduct was criminal. We note, also, that the evidence that defendant had confessed to 30 murders to his attorneys came from Cram's statement that defendant told him that he had told his attorneys that he had killed 30 people.

Defendant next argues that the introduction of certain improper evidence and argument based on that evidence denied him a fair trial. Defendant argues that the following information was irrelevant and prejudicial: that Robert Piest was of good character; that Darryl Stanson, Russell Nelson and William Kindred had planned to marry; that Robert Gilroy and John Mowery had planned on furthering their education; that Piest had been on the honor roll, the gymnastics team, and was "two badges away from making Eagle Scout, a badge which Robert had wanted badly"; that Nelson had graduated with honors and won a scholarship to the University of Minnesota and that Nelson and his future wife had the names of their children already chosen. Defendant also complains that Mary Jo Melanie Pauhs had testified with a brace on her neck despite defendant's offer to stipulate to her testimony.

The People respond that all this information was relevant to defendant's assertion that his victims were "street hustlers," "homosexuals" and "human trash." The People note that defense counsel, during opening argument, asserted that all the victims shared "certain sexual preferences." The People also note that defendant, in his confessions to the police, asserted "that all of the victims had been homosexual, bisexual, and that all had come to Gacy's house expecting to be paid for sex," that "all of the victims were hustlers, mostly from Bughouse Square," that "he never bothered straight people," that "the victims had killed themselves because they had sold their bodies for $20," and that "his victims were all male prostitutes." The People assert that the defense experts repeatedly suggested that defendant "regarded the boy prostitutes he picked up as trash," and that defendant "thought that he was performing a service to society by disposing of human trash, namely homosexual prostitutes."

We agree with the People that evidence concerning the victims' sexual preferences was relevant to negate the assertion that all the victims were homosexual prostitutes. Moreover, the evidence concerning Piest's activities in school and outside of school was relevant to defendant's statement to Officer Bettiker that Piest stated he would do almost anything for a great deal of money and the suggestion of a possible exchange of money for sex acts involved in the Piest murder. We fail to see the relevance, however, of evidence that Russell and his future wife had the names of their children already picked out and that Mrs. Nelson would not divulge the name of Russell's girl friend because she was trying to make a life of her own and was very upset about

what had happened. Additionally, we also fail to see the relevance in the evidence of the victims' surviving siblings or that Piest wanted to make Eagle Scout "badly" and similar information. Moreover, we agree with defendant that the prejudicial nature of this information was compounded by reference to it in closing argument. For example, the prosecution stated: "Thirty-three boys were dead and the lives of parents, brothers and sisters, fiancees, grandmothers, friends were left shattered." This court has found reference to the ages of the decedents' children to be highly inflammatory, requiring reversal even in the absence of an objection because the "highly prejudicial nature of such evidence is so well established *** that it was the duty of the court in a murder case to have refused it on its own motion." (*People v. Servello* (1964), 30 Ill. 2d 359, 372.) However, we conclude that reversal is not required under the facts of this case. It has been recognized that the effect of prejudicial or inflammatory evidence depends upon the circumstances of the case. In *People v. Jones* (1982), 94 Ill. 2d 275, the jury was informed that the defendant had been involved in numerous murders and had assaulted a couple living in East St. Louis, slashed the woman's throat, bludgeoned her face and head, cut deep gashes in her hands and arms, decapitated her husband, and carried the head of the husband and later discarded it. Rejecting an argument that certain photographs were prejudicial and inflammatory, this court stated:

> "It is unlikely that at this point in the proceedings the photographs would have created more revulsion in the jurors toward defendant than was already present. Since the jury deliberations took approximately 20 minutes it is clear that there was little difficulty in deciding that the death penalty was warranted, and we do not believe that the admission of these photographs at this late date in the proceedings deprived defendant of the right to be

> sentenced by a rational tribunal." (*People v. Jones* (1982), 94 Ill. 2d 275, 293-94.)

In this case, the evidence which might create revulsion in the jurors toward defendant included the sadistic torture of Rignall and Donnelly, his record-breaking number of murders, his homosexual assault on some of the victims before their murders, and other facts too numerous to mention. Considering that after a lengthy trial the jury required approximately 1 hour and 45 minutes to reject defendant's insanity defense, we conclude that defendant was not deprived of the right to be convicted by a "rational tribunal."

Defendant next contends that there were many instances where the People engaged in improper closing argument. Defendant argues that the assistant State's Attorney misstated the test for insanity when he stated: "But because he is abnormal doesn't mean that he doesn't know the difference between right and wrong. If he does, he is legally responsible." The assistant State's Attorney repeatedly stated the proper test, and the jury was not misled by this one statement. Second, defendant argues that the assistant State's Attorney improperly discredited Dr. Freedman's testimony by exaggerating the significance of DSM III and intentionally misrepresenting "the doctor's testimony regarding his diagnosis in relation to the manual." In closing argument, the assistant State's Attorney argued:

> "He [Dr. Freedman] used terms that are nonexistent in DSM III. Now I'm not going to talk to you in detail about the diagnoses that are in DSM III. I know you have heard more of that than you want to hear anyway. But if psychiatrists themselves cannot agree on what the terms are, on what the language means, then how can they communicate with each other, and, more important, how can they possibly communicate with us?"

Defendant asserts that the assistant State's Attorney's

attack on Dr. Freedman was not justified by the evidence. Defendant argues that equivalent diagnoses were contained in earlier drafts of DSM I and DSM II. Defendant's argument, however, concerns the persuasiveness of the assistant State's Attorney's argument, not its impropriety. We find no error. Third, defendant argues that the assistant State's Attorney improperly distorted the testimony of Dr. Rappaport and Dr. Eliseo. We have reviewed defendant's contentions, and are of the opinion that the assistant State's Attorney did not transcend the bounds of proper argument by characterizing Dr. Rappaport's testimony as he did or in drawing the inferences he believed were proper from that testimony. Defense counsel was free to argue that the evidence did not support the assistant State's Attorney's conclusions but rather supported the conclusion suggested by him. We find no error. Fourth, defendant argues that the assistant State's Attorney improperly implied that the success of defendant's expert witnesses' private practices depended upon finding defendants insane where there was no evidence to support this implication. The assistant State's Attorney argued:

> "Well, let me ask you something, consider something about privately retained psychiatrists who practice in the legal field. If a psychiatrist's only business comes from defense lawyers, if that is where his referrals come from, how many referrals do you think he is going to get back from that lawyer, or that lawyer's firm if he keeps finding people sane at the time of the crime?"

Defendant did not object to this argument and any alleged error is waived. Defendant contends that it was improper for the assistant State's Attorney to impugn the integrity of Dr. Morrison by commenting that she had the "nerve" to submit a bill for $9,000. No objection was made to this argument, and the issue is therefore waived. Defendant argues that the assistant State's Attorney improperly stated that Dr. Heston had not been compensated for examining the defendant. Defendant argues that because at the time he examined defendant, Dr. Heston was employed by the University of Iowa Medical School, he was receiving compensation since he examined defendant "as part of his job." No objection was made to this argument, so it too is waived. Defendant argues that the assistant State's Attorney's statement "that the psychiatric institute testified on behalf of defendants 75% of the time" was not based on facts in evidence. The assistant State's Attorney stated:

> "I don't know what the detailed statistics of the psychiatric institute are. But if they aren't 75 to 85 for the defendants, it would certainly surprise me."

No objection was made to this, so the issue was waived on appeal. Moreover, since Dr. Reifman testified that he testified on behalf of defendants about 80% of the time, even if the estimate is inaccurate, it was not totally unwarranted.

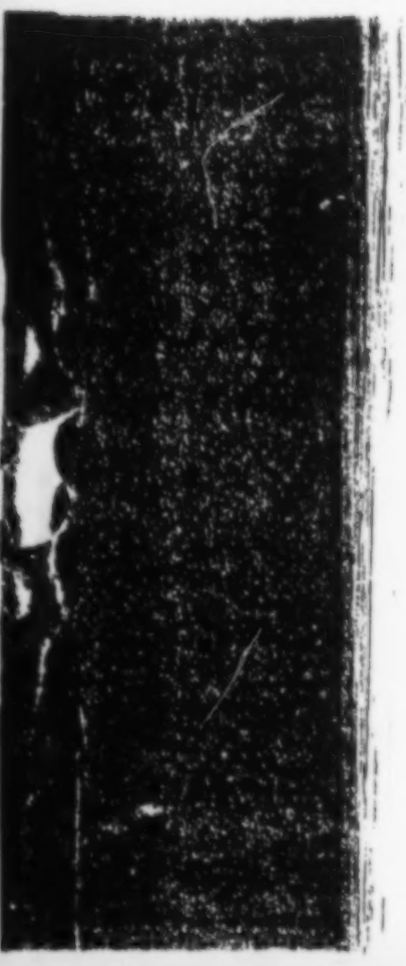
Defendant argues that it was error for the circuit court to refuse this instruction:

> "You are instructed that you are not bound by medical labels, definitions, or conclusions as to what is or is not a mental disease."

The court in refusing the instruction, explained:

> "I have indicated that I would not give that unless the defense—unless the State argued that in order to be a mental disease, it would have to be in the DSM III which they have not argued."

Defendant argues that the State did in fact argue this when it argued that Dr. Freedman used terms that were not in DSM III. The People respond that the instruction was unnecessary as every medical expert who testified placed a "medical label" on defendant's condition, that there was little agreement as to which medical label was appropriate, and no one contended that in order to be



valid, it was required that the medical label be listed in DSM III. The People argue further, citing *People v. Williams* (1967), 38 Ill. 2d 115, and *People v. Miller* (1965), 33 Ill. 2d 439, that the instruction was properly refused because it did not contain a correct statement of law, as Illinois does not recognize a "mere personality disorder" as meeting the test for insanity. The People argue that the proposed instruction was improper in that it "singled out a particular item of expert testimony" contrary to *People v. Speck* (1968), 41 Ill. 2d 177, 196-97, and was correctly refused because it was argumentative.

We are of the opinion that the instruction was properly refused. Contrary to defendant's assertion, the People did not argue that in order to be a mental disease, the disease must be listed in DSM III. The People argued that if Dr. Freedman did not use a term which is listed in the current diagnostic and statistical manual, and if the psychiatrists could not agree on which terms to use and what those terms mean, then it would be difficult or impossible for them to communicate with each other and, more importantly, with the jury. The jury was properly instructed concerning the credibility of witnesses (Illinois Pattern Jury Instruction (IPI), Criminal, No. 1.02 (1968)) and on the insanity defense (IPI Criminal No. 24.01), and defendant's instruction was unnecessary.

Defendant next argues that he was denied effective assistance of counsel because trial counsel indicated to the jury that evidence would be forthcoming which was never presented; because defense counsel repeatedly failed to object to misconduct by the prosecutors, and because they failed to tender a needed instruction. As indicated above, at opening argument defense counsel stated that four psychiatrists would testify for the defense. Defense counsel stated: "We have four psychiatrists who will testify in court ***," and then listed them. Several

pages later in the transcript, defense counsel stated, in the middle of a paragraph explaining the relation between the defendant's alleged mental disease and the question of whether he lacked substantial capacity to conform his conduct to the requirements of the law:

> "And again, those psychiatrists will testify that he was unable to fully and consciously control his acts, which are motivated by overwhelming and uncontrollable primitive drives."

From these statements, defendant concludes that the jury was expecting to hear four psychiatrists render an opinion that defendant was insane and that "the jury could not help but be skeptical of the defense" when they discovered that two psychiatrists would not state an opinion whether, under Illinois law, defendant was legally insane. The People argue that the comment neither stated nor implied that all the defense psychiatrists would render an opinion as to whether defendant would meet the statutory requirements for legal insanity and that, in any event, it is unlikely that the jury would have even remembered this comment in opening statement after hearing a month of complex and conflicting psychiatric testimony. We agree with the People on both contentions and reject defendant's argument.

Defendant's other citations to trial counsel's alleged incompetence are without merit. Defendant argues that trial counsel failed to tender an instruction to the effect that the jurors could only consider defendant's statements made to the examining expert witnesses with reference to his mental condition. As we have already noted, since there never was a question concerning whether defendant actually committed the 33 murders, the instruction was unnecessary, and thus there was no reason for defense counsel to tender such an instruction. There is no merit to the contention that the prosecutor misstated the legal test for insanity in closing argument;

thus there was no reason to interpose an objection, and trial counsel's failure to object to certain evidence concerning the victims does not constitute incompetence. Rather, this voluminous record is replete with indications that trial counsel expended considerable effort in seeking out expert witnesses for defendant and preparing for the cross-examination of the People's experts. Trial counsel presented numerous pretrial motions and vigorously objected to perceived errors throughout the trial. Defense counsel obviously made extensive efforts to research defendant's family history and early adult life. There is no merit to the assertion that their representation was ineffective.

Defendant argues that the murder of Timothy O'Rourke was not proved beyond a reasonable doubt and that this erroneous conviction necessitates a remand for a new sentencing hearing. Defendant's assertion that this murder was not proved beyond a reasonable doubt rests upon a distortion of the record. The doctor performing the autopsy listed the cause of death as "apparent drowning." The body was too badly decomposed to determine the cause of death with reasonable certainty, and the doctor performing the autopsy stated that he was unable to determine whether O'Rourke was dead when placed in the water. No gross amount of water was found in his lungs, which suggests that he might not have drowned. Although defendant asserts that there "were no signs of any trauma," the doctor performing the autopsy testified that strangulation could not be ruled out as a possible cause of death. Defendant's assertion that there was no evidence to connect Timothy O'Rourke with him is contrary to the record. O'Rourke was an admitted homosexual living with a transsexual lover on the north side of Chicago. The transsexual lover testified that O'Rourke had gone out to get cigarettes one night and never returned. Defendant had confessed

that he had picked up one of the young men whose body was found in the river at Clark and Lawrence in Chicago, one block from where O'Rourke and his transsexual lover were living. When O'Rourke's body was found in the Des Plaines River in Grundy County, it was naked and bloated. This physical evidence indicated that the body had been in the river a long time and that the victim may have been involved in a sexual murder. In view of the fact that defendant stated he threw five bodies from the I-55 bridge and all five bodies were found in the same general vicinity, a reasonable inference to be drawn was that O'Rourke was one of defendant's victims. We are of the opinion that the testimony concerning O'Rourke's disappearance, when considered with defendant's statement as to where he picked up one of his victims, the location of the body in the Des Plaines River, the physical condition of the body when found, and defendant's statement that he threw five bodies in the river, in light of all the evidence in this case, was sufficient to permit the jury to conclude that defendant had murdered Timothy O'Rourke and the People had proved this beyond a reasonable doubt.

Defendant next asserts that he was not proved guilty beyond a reasonable doubt of committing indecent liberties and deviate sexual assault on Robert Piest as there was no *corpus delicti* for these offenses. Defendant also asserts that he cannot simultaneously be convicted of deviate sexual assault and indecent liberties on Robert Piest. The People respond that since no sentence was imposed on either charge the issue is moot. The People also assert that defendant's confession to deviate sexual assault and indecent liberties on Piest was sufficiently corroborated. Citing *People v. Willingham* (1982), 89 Ill. 2d 352, 360, the People argue that they need not prove the *corpus delicti* beyond a reasonable doubt, but only introduce some evidence to corroborate the defendant's

confession that a crime occurred. The People argue that the following evidence sufficiently proves a *corpus delicti*: Piest's body was recovered naked except for a pair of socks, the handcuffs used on Piest were recovered, there was no conceivable motive for killing Piest unless defendant was trying to cover up a deviate sexual assault, and the pattern of killing by defendant supports a contention that a deviate sexual assault occurred.

We find it unnecessary to address these contentions. Since no sentences were imposed on these convictions, the remaining question is whether the convictions, if improper, would have affected the sentencing jury. As the People point out, with or without the convictions, the jury still would have been exposed to defendant's confession which detailed the assault on Piest. Moreover, considering the enormous amount of evidence establishing aggravating factors against defendant, we cannot say that these convictions, even if improper, deprived defendant of a fair sentencing hearing.

Defendant next argues that his representation at the death penalty hearing was incompetent. Defendant cites four factors that allegedly demonstrate the low level of his representation. The factors are: failure to prepare for the hearing, failure to present any evidence on the statutory mitigating factor of extreme mental or emotional disturbance, failure to present other mitigating evidence, and failure to make a competent closing argument.

Defendant contends that his trial counsel should have requested a continuance to prepare for the sentencing hearing. From what appears to be counsel's plan, however, no lengthy preparation was necessary. Trial counsel stipulated to the admission at the sentencing hearing of all the evidence presented at trial. Since counsel's plan seems to have been to limit his presentation at the sentencing hearing to a plea for mercy, counsel may have decided that any continuance in a trial which has already

lasted more than one month, with a jury in sequestration, would serve only to antagonize the jury toward the party requesting the continuance. Thus, assuming that trial counsel's strategy for the sentencing hearing was reasonable, there was no need for him to request a continuance before the hearing.

Defendant next complains that his trial counsel was incompetent for failing to present any evidence on the statutory mitigating factor of extreme mental or emotional disturbance. Defendant argues that any of the expert witnesses who testified for either side should have been examined at the sentencing hearing on this point. Trial counsel, however, chose not to recall any of the expert witnesses, but by using their previous testimony, which had been admitted by stipulation in the sentencing hearing, argued to the jury that the previous expert testimony was sufficient to show this mitigating factor. We cannot say that it was incompetent for trial counsel to make this choice and to possibly avoid antagonizing the jurors by subjecting them to psychiatric testimony which may have sounded repetitive to them. Alleged incompetency arising from a matter of trial tactics or strategy will not support a claim of ineffective representation. *People v. Haywood* (1980), 82 Ill. 2d 540, 543-44.

Defendant next contends that his trial counsel was incompetent since he failed to present other mitigating evidence. Defendant contends that such evidence could have included his childhood experiences, his family relationships, his business career, and his charitable and civic work. As in the prior argument where defendant contends that psychiatric testimony could have been repeated at the sentencing hearing, trial counsel may also have made the tactical choice not to repeat the suggested mitigating evidence of such matters as his family relationships and civic work which were already presented at trial. As before, we will not question what ap-

pears to be, on these facts, a tactical decision.

Defendant also complains that his trial counsel made an incompetent closing argument. We cannot agree. Counsel, pointing to the psychiatric testimony introduced at trial, first argued that defendant acted under an emotional disturbance. Next, in the main theme of counsel's closing argument, he proposed that it would be better to study defendant than to have him executed in an act of revenge. We must judge the remarks in their setting and against the background of the jury's verdicts. Trial counsel could have made the decision that it would be better to argue against the death penalty itself than to try to explain that there were mitigating factors sufficient to avoid the death penalty in light of the 12 murders of which defendant had been convicted and for which defendant was eligible for the death penalty. The same jury had also convicted defendant of 21 other murders and of indecent liberties with a child and deviate sexual assault. The jury was also aware of the brutal nature of many of the murders and of the youth of many of the victims. Trial counsel could not controvert these facts; he could not change them; he was confronted with the task of making an extremely difficult argument. We cannot say that the argument showed professional incompetence. See *People v. Gill* (1978), 64 Ill. 2d 357, 364-65.

Defendant next complains that the prejudicial arguments of the assistant State's Attorneys denied him a fair sentencing hearing. Defendant first argues that the following remark helped to deny him a fair sentencing hearing: "I will be frank with you, ladies and gentlemen, as a citizen of the State of Illinois myself, I don't want to pay this guy's rent for the rest of his life." We agree that the remark was improper as it tended to inject the "cost factor" and the assistant State's Attorney's personal beliefs into the jury's deliberations. It is clear, however, that the remark was merely a sarcastic assertion that life imprisonment for defendant to allow him to be studied was an inadequate punishment. In the context in which it was made, and on this record, we hold that the error in failing to sustain the objection to the remarks of the assistant State's Attorney was harmless. We also note that the objection to the assistant State's Attorney's statement about rent was posed as follows: "Objection, Judge. Then let Mr. Kunkle pull the switch." The court may have decided that an objection made in that form should pass without further comment.

Defendant next complains that the following argument was improper:

> "The evidence will show that John Gacy is plainly and simply an antisocial person. That only means that he will murder and murder and murder again and again, if you allow him to do so."

While defendant argues that the insinuation that if he were sentenced to life imprisonment he would kill again was improper because it was not supported by the record, we cannot agree in light of the fact that defendant was convicted of 33 murders. We also note that the inference may be drawn that defendant's prior imprisonment had failed to deter him from committing further crimes.

Defendant contends that the assistant State's Attorney argued to the jury that if it did not sentence defendant to death, it would not have followed the law, it would have failed to do its duty, it would have ignored the mandate of the citizens of Illinois, and it would have made a mockery of the law and the concept of justice. Defendant asserts that the statements, in effect, directed a verdict of death and stripped the jury of its duty to weigh the evidence fairly and dispassionately decide on the proper sentence. We cannot agree. From the context of the statements, we find that the assistant State's Attorney was merely arguing that the People

had proved their case, and were entitled to a decision in their favor. Any implication that a death sentence was mandatory was negated by the jury instructions.

Defendant also argues that the assistant State's Attorney's opening statement at the death penalty hearing was improper because, when commenting on the statutory mitigating factor that the murders were committed while the defendant was under the influence of extreme mental or emotional disturbance, he told the jurors that they had flatly rejected that factor when they found defendant guilty and that the mitigating factors were simply statutory guidelines, and not loopholes for the defendant. It appears, from our reading of the record, that the assistant State's Attorney was arguing that defendant's expert testimony would not show the mitigating factor that the murders were committed while defendant was under the influence of extreme mental or emotional disturbance just as the expert testimony had not shown that defendant should be found not guilty by reason of insanity. We note further that defendant made no objection to this portion of the argument, which waives the issue on appeal. (*People v. Jackson* (1981), 84 Ill. 2d 350, 358-59.) Defendant's objection to the characterization of mitigating factors as statutory guidelines was also not error here, as it fairly described the function of the statutory mitigating factors. (*People v. Jones* (1982), 94 Ill. 2d 275, 282-86.) We also note that when the assistant State's Attorney began to comment further upon the law in regard to mitigating factors, defendant promptly made an objection which was sustained. In sum, we conclude that all the alleged errors during argument, as reviewed together, would not constitute reversible error.

Defendant next complains that the jury was improperly instructed before its deliberations in the death penalty hearing when the court misstated one of the instructions as follows:

> "If, after your deliberations, you unanimously conclude there are mitigating factors sufficient to preclude imposition of the death penalty, you must sign the verdict form directing a sentence of imprisonment."

The instruction as tendered to the jury in written form, read:

> "If, after your deliberations, you are not unanimous in concluding that there are no mitigating factors sufficient to preclude imposition of the death sentence, you must sign the verdict form directing a sentence of imprisonment."

Not only was the jury given the correct version in the written instruction, but the verdict form also gave the correct version of the law, as did oral instructions before argument on the death sentence, and in another portion of the oral instructions to the jury before their deliberations. Thus, none of the written instructions were incorrect, but a discrepancy existed in the oral instructions. We note that defendant did not attempt to correct the judge when the incorrect version of the instruction was read. Defendant cites the cases of *People v. Kubat* (1983), 94 Ill. 2d 437, *People v. Haywood* (1980), 82 Ill. 2d 540, and *People v. Jenkins* (1977), 69 Ill. 2d 61, in support of his contention that the giving of conflicting instructions to the jury was reversible error. In *Haywood* and *Jenkins*, this court reversed the judgments because conflicting written instructions were given to the jury. We do not find these cases controlling, however, because here defendant does not complain that any of the written instructions were incorrect, only that one of the readings of one of the instructions was misstated. In *Kubat*, the court upheld a sentence of death although the jury had been given conflicting written instructions on the precise issue involved here. While defendant has attempted to distinguish *Kubat* by arguing that the

defendant in that case had waived his right to complain about the conflicting instructions because no objection was made to them, we find the circumstances here more compelling to hold that the error was harmless since the instruction was incorrect in only one of the readings and in none of the written forms. In view of the fact that the jury was instructed correctly as to the law on this point four separate times, all of the written instructions being correct, we fail to see how the jury was left with a mistaken interpretation of the law, or that it was confused on this point.

Defendant contends next that the court should have determined that defendant knowingly and intelligently agreed to a stipulated sentencing hearing. The People and defendant stipulated that all the evidence heard at the trial could be considered by the jury at the death penalty hearing. Defendant argues that such a stipulation was the functional equivalent of a guilty plea and defendant should have been personally addressed to ascertain his understanding of the stipulation and its consequences. We find, however, that since the jurors, in the absence of a stipulation, could consider all the evidence presented at trial in their deliberations upon the death penalty, it was not necessary to obtain defendant's permission for them to do so. Ill. Rev. Stat. 1979, ch. 38, par. 9—1(c); *People v. Lewis* (1981), 88 Ill. 2d 129, 146-47; *People v. Carlson* (1980), 79 Ill. 2d 564, 589-90.

Defendant also complains that a knowing and intelligent waiver of his right to have time to prepare for sentencing should have been placed on the record. We have already considered the reasoning behind immediately proceeding to a sentencing hearing, and we decline to further discuss it here. We note that a defendant normally speaks through his attorney, who stands in the role of agent, and defendant, by permitting his attorney, in his presence and without objection, to immediately proceed to a sentencing hearing is deemed to have acquiesced in, and to be bound by, his actions. *People v. Sailor* (1969), 43 Ill. 2d 256, 260; *People v. Novotny* (1968), 41 Ill. 2d 401, 410.

Defendant next argues that "because of the significant mitigating evidence contained in this record, the sentence of death imposed upon John Gacy must be vacated ***." Defendant asserts that "virtually all of the expert witnesses for both sides support the proposition that defendant was acting under an 'extreme mental or emotional disturbance,' " a statutory mitigating factor. (See Ill. Rev. Stat. 1979, ch. 38, par. 9—1(c)(2).) Defendant also argues that the evidence of extreme disturbance was not the only mitigating evidence in the record, and that evidence which showed that defendant "was a good husband and stepfather ***, a good friend to many ***, a loving son and brother ***, a successful businessman ***, a civic leader active in charitable work and politics ***," and while awaiting trial, "an ideal prisoner," also constituted mitigating evidence.

Citing *People v. Brownell* (1980), 79 Ill. 2d 508, the People argue that the decision at sentencing in a capital case is a balancing process in which the seriousness of the crime must be weighed against whatever mitigating factors exist. The People then detail the heinous nature of defendant's crimes both with the living victims and those who did not survive. The People assert that it is "just not true" that the People's expert witnesses claimed that defendant suffered from an extreme emotional disturbance. Rather, the People assert, all of the People's experts stated that he was suffering "from a mere personality or character disorder."

We need not address the argument whether the jury was required to accept that the collective expert testimony in this case established that defendant was suffering from an extreme mental or emotional disturbance.

As the People correctly point out, the decision at sentencing in a capital case is a balancing process. (*People v. Brownell* (1980), 79 Ill. 2d 508.) While many labels were placed on defendant's mental condition, all of the People's experts characterized defendant's defect as a personality or character disorder. In light of the number of victims in this case, their ages, the sadistic sexual torturing of Rignall and Donnelly, the attacks on other victims both in Illinois and Iowa, and the other aggravating factors, we cannot say that the jury was required to determine that whatever emotional disturbance defendant suffered precluded the sentence of death. Furthermore, much of the mitigating evidence to which defendant points is questionable. Many witnesses indicated that the only reason defendant was involved in charitable or political work was in order to manipulate others or gain advantage for himself. For example, there was evidence in the record that defendant liked to "play clown" because he could grab the breasts of women in a crowd watching a parade and get away with it. Defendant may have been a good husband and stepfather to his second wife and her children, but the evidence concerning his former marriage is anything but mitigating. The evidence established that defendant offered his wife to adolescent boys in exchange for oral sex. Apparently he has not seen his own children since he left Iowa. The evidence of defendant's "horribly troubled childhood" is questionable. While the evidence indicated that defendant's father was an alcoholic, was disapproving, and physically abusive to both defendant and his mother, defendant did have a loving mother and loving siblings. Defendant's mother was conscientious concerning defendant's education, and was supportive of defendant in his childhood and even in his adult life when defendant returned to Chicago. A disapproving father does not excuse 33 homosexually related murders and numerous

other incidents of sexual torture and physical abuse. We decline to disturb the jury's determination.

Defendant also complains that a second jury should have been impaneled for the death penalty hearing since the original jury allegedly confused the statutory mitigating factor of extreme emotional or mental disturbance with the issue of insanity. Defendant alleges that if a different jury had been impaneled its attention would have been focused solely on aggravation and mitigation without the distraction of the insanity determination. Defendant contends that the jury was confused as to the requirements of the mitigating factor as differentiated from the defense of insanity and that this was evidenced by the confusion shown by the attorneys in their arguments in the death penalty hearing.

We cannot determine on this record that the jury was confused. The record shows that the defense attorneys were sufficiently able to distinguish between the defense of insanity and the mitigating factor of extreme mental or emotional disturbance. Even if it could be shown that the jury was confused, we do not believe that that would constitute sufficient "good cause" to warrant a second jury. (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(d)(2).) In *People v. Lewis* (1981), 88 Ill. 2d 129, the defendant advanced similar arguments, contending that a second jury would not have preconceived notions that the death penalty should be imposed. We rejected the defendant's arguments in that case, and find that case apposite here.

Defendant next contends that the failure of the death penalty statute to require that the People prove beyond a reasonable doubt the absence of mitigating factors sufficient to preclude the death penalty makes that statute unconstitutional. We rejected this contention in *People v. Eddmonds* (1984), 101 Ill. 2d 44, 68, and we decline to reconsider it here.

Defendant also contends that the unlimited introduc-

tion and consideration of nonstatutory aggravating factors renders the death penalty statute unconstitutional. Defendant relies upon *Henry* v. *Wainwright* (5th Cir. 1981), 661 F.2d 56, *vacated and remanded* (1982), 457 U.S. 1114, 73 L. Ed. 2d 1326, 102 S. Ct. 2922, *aff'd on remand* (5th Cir. 1982), 686 F.2d 311, *vacated and remanded* (1983), ___ U.S. ___, 77 L. Ed. 2d 1407, 103 S. Ct. 3568, in support of his argument. We have rejected defendant's contention, and the applicability of *Henry* thereto in *People* v. *Davis* (1983), 95 Ill. 2d 1, 38, and in *People* v. *Free* (1983), 94 Ill. 2d 378, 427, and decline to reconsider it here. We also note that the Supreme Court has upheld a death sentence notwithstanding the consideration by the sentencing court of a nonstatutory aggravating factor. *Barclay* v. *Florida* (1983), ___ U.S. ___, 77 L. Ed. 2d 1134, 103 S. Ct. 3418.

Defendant also contends that the death penalty statute is vague since it does not define the term "extreme mental or emotional disturbance." In *Proffitt* v. *Florida* (1976), 428 U.S. 242, 255-56, 49 L. Ed. 2d 913, 924-25, 96 S. Ct. 2960, 2968-69, the Supreme Court rejected this argument with respect to similar wording in a Florida statute. In *People* v. *Brownell* (1980), 79 Ill. 2d 508, 528-30, we considered whether the sentencing standards of our death penalty statute are vague, and found them to be sufficiently specific. We decline to reconsider that decision on the basis of defendant's argument here. Defendant has also argued that the use of the term "extreme" renders the statute unconstitutional as it improperly limits the jury's consideration of any level of mental or emotional disturbance as a mitigating factor. We find this portion of defendant's argument to be without merit as the jury was specifically instructed to consider "any other facts or circumstances that provide reasons for imposing less than the death penalty."

Defendant also argues that the death penalty statute is unconstitutional for failing to require that the jury specify whether it has found mitigating factors to be present. We rejected this argument in *People* v. *Gaines* (1981), 88 Ill. 2d 342, 363, and decline to reconsider it here. See also *People* v. *Brownell* (1980), 79 Ill. 2d 508, 541-44.

Defendant has also contended that the sentence discretion vested in the prosecution by the death penalty statute is an unconstitutional delegation of legislative and judicial authority. This court rejected that argument in *People ex rel. Carey* v. *Cousins* (1979), 77 Ill. 2d 531, and adhered to its holding in later decisions, e.g., *People* v. *Edmonds* (1984), 101 Ill. 2d 44, 69; *People* v. *Lewis* (1981), 88 Ill. 2d 129, 146.

Defendant contends that it was error to permit the People to both open and close final arguments at the death penalty hearing. We have considered this question in *People* v. *Edmonds* (1984), 101 Ill. 2d 44, 66, in the context of whether in failing to object to the procedure counsel failed to render effective assistance. We held that since the People are the moving party in a death penalty proceeding they are entitled to rebuttal argument. (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(d); see *Lipsh* v. *Security Benefit Association* (1932), 350 Ill. 414.) The fact that defendant, in effect, stipulated to the statutory aggravating factor which the People were required to prove beyond a reasonable doubt does not alter that requirement. The circuit court did not err in permitting the People to open and close the arguments at the sentencing hearing.

Defendant has also argued that the death penalty statute is unconstitutional because it fails to provide adequate comparative review procedures. We have rejected this contention (*People* v. *Brownell* (1980), 79 Ill. 2d 508, 541-44) and will not reconsider it here.

Defendant next argues that the death penalty statute requires that where a defendant is convicted of more than one murder, but the deaths occurred in unrelated acts, no aggravating factor exists unless it is proved that these acts were premeditated. Our statute provides that a defendant may be sentenced to death if he "has been convicted of murdering two or more individuals *** regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts ***." (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(b)(3).) Defendant argues that since any premeditated murder encompasses an intent to kill, the General Assembly must have intended to require that when the deaths occur in the same or related acts, the People must prove only an intent to kill more than one person and when the deaths occur in unrelated acts, it must be proved that these killings were premeditated. Defendant argues that any other interpretation would make the phrase "premeditated acts" meaningless and superfluous. These contentions were considered and rejected in *People* v. *Davis* (1983), 95 Ill. 2d 1, 34-36, and will not be reconsidered here.

Defendant has also contended that his sentences must be vacated and the cause remanded for resentencing because the court sentenced him without the benefit of a presentence investigation report. Defendant concedes that this court in *People* v. *Gaines* (1981), 88 Ill. 2d 342, 372-74, held that a presentence investigation report is not required in capital murder cases. Defendant also argues, however, that his natural life sentences for the 21 counts of murder which occurred prior to the effective date of the death penalty statute required a presentence investigation report. Defendant has not shown, however, how he was prejudiced by the lack of such a report. We

also note that the examination of the history, background and mental state of defendant was quite thorough at trial, and that the information derived therefrom substantially fulfills the requirements (Ill. Rev. Stat. 1979, ch. 38, par. 1005—3—2(a)) of the presentence investigation report. We see no additional purpose to be served by a formal presentence investigation report under the facts of this case. Defects in a presentence investigation report may be waived (*People* v. *Godinez* (1982), 91 Ill. 2d 47, 56-57; *People* v. *Meeks* (1980), 81 Ill. 2d 524, 533-34), and no objection was raised when the court proceeded to immediate sentencing on all the charges. In fact, one of the attorneys for the defendant stated on the record, outside the defendant's presence, that it was the defendant's request that he be sentenced immediately, without the benefit of a presentence investigation report. We see no basis upon which to find that a formal written presentence investigation report would alter the judge's determination on the facts of this case.

Defendant's last contention is that his rights were violated when he was not permitted to be present when his attorneys made the motion for a new trial. We fail to see how defendant was prejudiced by his absence from this portion of the proceedings. Although the motion made on his behalf was denied, it preserved all alleged errors on appeal, and thus inured to his benefit. While defendant has a fundamental right to be present at any critical stage of the proceedings against him, he does not have an absolute right to be present also at the argument of motions subsequent to verdict. (*People* v. *Rhods* (1963), 27 Ill. 2d 393, 396; *United States* v. *Lynch* (3d Cir. 1942), 132 F.2d 111, 113; see also *Snyder* v. *Massachusetts* (1934), 291 U.S. 97, 106-08, 78 L. Ed. 674, 679-79, 54 S. Ct. 330, 332-33.) Defendant argues that he should have been permitted to present his own arguments in support of the motion for a new trial. Defend-

ant was, however, represented by counsel and until his appearance in this court had made no request to be permitted to defend himself. On these facts, we must conclude that defendant waived his right to personally argue the motion for a new trial. (*People v. Ephraim* (1952), 411 Ill. 118, 122-23.) Defendant also contends that he should have been present when the record was corrected to show that on March 18, 1980, when the death penalty verdict was returned, defendant waived his right to a presentence investigation and requested the immediate imposition of sentence. Defendant's presence, however, was not necessary for a correction of the record. (*People v. Hirushkery* (1951), 410 Ill. 168, 168.) Defendant has also complained that he should have been allowed to hear in person why the court imposed natural life sentences upon him and also to witness the summary denial of his motion for a new trial. On these facts we cannot see how defendant was prejudiced in this regard.

In their brief, *amici curiae*, 60 in number, argue that the death penalty is *per se* unconstitutional. *Amici* argue, *inter alia*, that in order to deprive someone of a fundamental right, life, the People must prove that the death penalty is necessary to further some compelling State interests. *Amici* concede that deterrence is a compelling State interest but, citing statistical studies, argue that the death penalty does not deter. The People respond that the statistical studies upon which *amici* rely are "based on obsolete data interpreted in a crude and misleading manner." The People contend that the application of more advanced statistical techniques, such as regression analysis, yields results contrary to the studies cited by *amici*. Moreover, the People assert, the studies cited by *amici* do not cite the statistical significance of particular death statutes and particular types of homicide, but rather categorize all homicides and all death penalty statutes in one category. The People contend

that while the death penalty may not deter a crime of passion, the death penalty in Illinois is not applicable to such a crime, but may very well provide the deterrence for a criminal who wishes to eliminate potential witnesses, the murderer who kills people in exchange for money, and other premeditated murderers. The People contend that the Supreme Court has already rejected *amici's* argument:

> "Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. ***
>
> Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.
>
> The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." *Gregg v. Georgia* (1976), 428 U.S. 153, 184-86, 49 L. Ed. 2d 859, 881-82, 96 S. Ct. 2909, 2930-31.

Because we are of the opinion that they are not presented to the proper forum, we do not address the merits of *amici's* arguments. *Amici's* central argument is premised on the accuracy of the statistical data which they cite in support of their contentions. Although *amici*

assert that "there is virtually no serious study that indicates the death penalty is a deterrent above and beyond imprisonment ***," the People cite recent studies which reach the opposite conclusion. As noted in *Gregg*, the determination of whether capital punishment is a deterrent to certain types of murders such as those enumerated in the Illinois death penalty statute is an issue the resolution of which properly rests with the General Assembly. We decline to usurp the legislative function.

For the reasons stated, the judgment of the circuit court of Cook County is affirmed. The clerk is directed to enter an order setting Wednesday, the 14th day of November, 1984, as the date on which the sentence of death entered by the circuit court of Cook County shall be executed. The defendant shall be executed by a lethal injection, in the manner provided by section 119–5 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1983, ch. 38, par. 119–5). A certified copy of this order shall be furnished by the clerk of this court to the Director of the Department of Corrections, to the warden at Stateville Correctional Center, and to the warden of the institution wherein the defendant is confined.

Judgment affirmed.

JUSTICE SIMON, concurring in part and dissenting in part.

I agree that the convictions of murder should be affirmed in this case. However, for the reasons set forth in my separate opinions in *People v. Lewis* (1981), 88 Ill. 2d 129, 170 (Simon, J., dissenting), and in *People v. Silagy* (1984), 101 Ill. 2d 147, 184 (Simon, J., concurring in part and dissenting in part), I believe that the Illinois death penalty statute is unconstitutional and that the death sentence should be vacated.

APPENDIX B

Order of Illinois Supreme Court
denying Petition for Rehearing

53212

ILLINOIS SUPREME COURT
ARLEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

September 28, 1984

State Appellate Defender
109 N. Dearborn St., 8th Flr.
Chicago, IL 60602

No. 53212 - People State of Illinois, appellee, vs. John Wayne Gacy, appellant. Appeal, Circuit Court (Cook).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court, Circuit Court or other Agency on October 5, 1984.

OPPOSITION BRIEF

ORIGINAL

(3)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JOHN GACY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

BRIEF IN OPPOSITION TO CERTIORARI

NEIL F. HARTIGAN
Attorney General,
State of Illinois,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601,

Attorney for Respondent.

RICHARD M. DALEY,
State's Attorney,
County of Cook,
Room 500 Richard J. Daley Center,
Chicago, Illinois 60602,
MICHAEL E. SHABAT,*
KEVIN SWEENEY,
Assistant State's Attorneys,
Of Counsel.

*Counsel of Record
(312) 443-5496

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JOHN GACY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

BRIEF IN OPPOSITION TO CERTIORARI

Respondent, the People of the State of Illinois, respectfully prays that this Honorable Court deny the Petition for a Writ of Certiorari filed in this matter.

JURISDICTION

This Court lacks jurisdiction as to the second argument made in the petition for a writ of certiorari, since that issue was neither raised in the Illinois Supreme Court nor decided by that court. 28 U.S.C. 1257(3). (See Reasons for Denying the Writ, Section II)

MANNER IN WHICH THE CONSTITUTIONAL CLAIMS WERE RAISED

The second argument made in the petition for a writ of certiorari was never raised in the Illinois Supreme Court or decided by that court. (See Reasons for Denying the Writ, Section II)

STATEMENT OF THE CASE

Petitioner John Gacy was convicted of the murder of 33 boys and young men. Evidence at the jury trial indicated that all except one of the 33 victims had been strangled. (R. 2190) There was evidence from which the jury could have concluded that Gacy tortured and sexually assaulted his victims before killing them. (R. 1037, 2391-2416, 4025-4061)

The same jury approved death sentences for the twelve murders proven to have taken place after the Illinois death penalty statute came into effect.

REASONS FOR DENYING THE WRIT

I.

PROSECUTORIAL DISCRETION IN SEEKING A DEATH SENTENCE IS DESIRABLE AND IS INEVITABLE UNDER ANY DEATH PENALTY STATUTE WHICH COULD BE DRAFTED.

Gacy argues that it is unconstitutional to grant prosecutors discretion on whether to seek a death sentence. There is a serious question as to whether Gacy has standing to make that argument. He has not suggested what standards should be used to control prosecutorial discretion, but any conceivable standards would have allowed the prosecutors to seek a death sentence against Gacy.

In any event there are a number of reasons why this question does not justify review by this Court:

> 1. Prosecutorial discretion in criminal cases, including death penalty cases, is a traditional and constitutional part of this country's system of justice.
>
> 2. Prosecutorial discretion on whether to seek a death sentence is inevitable under any death penalty statute which could be drafted.
>
> 3. It is both desirable and constitutional to give executive officials the power to exercise clemency in death penalty cases.
>
> 4. Mandatory standards governing prosecutorial discretion in death penalty cases would have the undesirable result of forcing some prosecutors to seek death sentences when they did not think such sentences were justified.

This Court has held that it is constitutional to grant prosecutors discretion as to what charge to bring, even when the charge is relevant only to punishment and not to the facts to be proven at trial. United States v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982); Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 74 (1982). For example, in Bordenkircher it was held that a prosecutor could properly increase a charge

from a minor felony to a charge carrying a sentence of mandatory life imprisonment, even when both charges required proof of essentially the same facts. Similarly, in Goodwin it was stated that a federal prosecutor could properly increase a misdemeanor charge to a felony, even when the factual basis for each charge was the same.

This Court has stated that prosecutorial discretion may also be exercised in death penalty cases. In Gregg v. Georgia, 428 U.S. 153, 199, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859, 889 (1976) an opinion joined by three justices of this Court stated:

> First, petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons who he wishes to prosecute for a capital offense and to plea bargain with them.... Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.

Also in Gregg, an opinion joined by three other justices of this Court stated:

> Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. That is untenable. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.... This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious.... 428 U.S. at 225, 96 S.Ct. at 2944, 41 L.Ed.2d at 903.

Thus in Gregg this Court ruled that it is constitutional to grant prosecutors discretion on whether or not to seek a death sentence. In fact Gregg is directly on point here, because in all essential aspects the decision of

a prosecutor to seek the death penalty in Georgia resembles the decision of a prosecutor to seek the death penalty in Illinois. Although the Georgia statute did not explicitly give the prosecutor sole discretion to seek a death sentence, it required the prosecution to prove an aggravating factor beyond a reasonable doubt and to give the defendant notice before trial of the evidence to be produced in aggravation. Georgia Code Ann., secs. 27-2503, 27-2534.1 (Supp. 1975). Thus a Georgia prosecutor could block imposition of the death penalty by refusing to produce evidence of an aggravating factor or by refusing to give notice of evidence in aggravation. This Court found the grant of such prosecutorial discretion constitutional.

In the Proffitt decision this Court repeated its holding in Gregg, stating that it was constitutional to grant prosecutors discretion to seek or not to seek a death sentence. Proffitt v. Florida, 428 U.S. 242, 254, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976). Specifically, this Court stated that it was constitutional to grant prosecutors the power to charge or not to charge a capital offense and to plea bargain to enable defendants to avoid a death sentence on a plea of guilty. This Court also found it constitutional to grant an executive authority the power to commute a death sentence. As was stated in a separate opinion joined by three justices of this Court, the conclusion that the Florida statute is constitutional "...is not undercut by the possibility that some murderers may escape the death penalty solely through exercise of prosecutorial discretion or executive clemency." 428 U.S. at 261, 96 S.Ct. at 2970, 49 L. Ed.2d at 928. It should be noted that the Florida statute, like the Georgia statute, gave the prosecution the power in any case to block imposition of the death penalty either by bringing a lesser charge or by refusing to produce proof of an aggravating factor. Fla. Ann. Stat. secs. 782.04, 921.141 (Supp. 1976-1977).

In fact prosecutors would have discretion to seek a death sentence or show clemency under any death penalty statute which could be drafted. Statutes imposing mandatory sentences of death are unconstitutional. Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). Therefore a death sentence may be imposed only if the prosecution proves that aggravating factors exist making the death penalty appropriate for the crime committed by the defendant. Moreover, since jury discretion must be restricted by law, a death penalty statute must name specific aggravating factors which authorize a death sentence. Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.

2d 398 (1980). Therefore in practice the prosecution may always prevent imposition of a death sentence simply by refusing to produce evidence of an aggravating factor.

Also, a prosecutor may elect not to seek a death sentence simply by refusing to bring a capital charge, by dismissing or reducing an existing charge, or by plea bargaining. Gacy is just wrong when he suggests that no other jurisdiction gives prosecutors the same discretion as does Illinois. In practice every state which has a death penalty statute gives prosecutors discretion to seek or to prevent imposition of a death sentence.

It is true that in Illinois a death penalty hearing may be convened only at the request of the prosecution. People v. Lewis, 88 Ill. 2d 129, 430 N.E.2d 1346 (1981); People ex rel. Carey v. Cousins, 77 Ill. 2d 531, 397 N.E. 2d 809 (1979); Ill. Rev. Stat. 1979, Ch. 38, sec. 9-1(d). This is merely a statutory codification of an inevitable result. Illinois is not required to perform the futile act of holding a death penalty hearing at which no death sentence could be imposed.

Gacy's argument is that prosecutorial discretion concerning a death sentence is constitutional before trial, but unconstitutional before a sentencing hearing. There is no justification or precedent for that argument. Since it is constitutional to give prosecutors absolute power to charge or not charge a capital offense, it follows that it is constitutional to give prosecutors the power to seek or not seek a death sentence. The practical effect of each kind of discretion is the same.

Moreover, if Gacy's argument were to be adopted, the result would be to force prosecutors to seek death sentences when neither the prosecutors nor the community wanted the death penalty to be imposed. Gacy asserts that prosecutorial discretion to seek a death sentence must be controlled by statutory standards and must be consistent under these standards from case to case. If prosecutors had to comply with such standards, then they would have to seek death sentences in certain cases in which neither the prosecution nor the public believed the defendant should be executed. Such a result would be clearly undesirable.

In addition, review of prosecutorial discretion in death penalty cases would add nothing to the protection given to defendants by existing law. The State may not obtain a death sentence merely by requesting it. A defendant may be sentenced to death only if the judge or jury, guided by explicit statutory standards, finds that such a sentence is required by the law and the

evidence. Ill. Rev. Stat. 1979, Ch. 38, sec. 9-1. Thus defendants are protected against arbitrary requests by the prosecution for a death penalty hearing.

For Gacy's proposed standards to mean anything, they would have to require a review for proportionality of cases in which a death sentence was requested by the prosecution and cases in which it was not requested. But this Court has held that such a review for proportionality is not constitutionally required. Pulley v. Harris, ___ U.S. ___, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Also, as noted, standards governing prosecutorial discretion could cause prosecutors to seek death sentences when they did not want to do so, since a failure to request a death sentence in a current case might bind the prosecution in future cases.

Also, Gacy's argument assumes that it is unconstitutional to give an executive official the right to exercise clemency in death penalty cases. But an individual state has the same right to permit a prosecutor to show mercy as it does to give that power to a governor or commission. As was stated in Gregg v. Georgia, 428 U.S. 153, 199 fn. 50, 96 S.Ct. 2909, 2937 fn. 50, 49 L.Ed.2d 859, 889 fn. 50 (1976):

> In order to repair the alleged defects pointed to by petitioner, it would be necessary to require that the prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they refuse to plea bargain with the defendant.... Finally, acts of executive clemency would have to be prohibited. Such a system, of course, would be totally alien to our notions of criminal justice.
>
> Moreover, it would be unconstitutional.

Thus in Gregg this Court indicated that prosecutorial discretion in seeking a death sentence, and a clemency power vested in executive officials, are not only constitutionally permissible, but may be constitutionally required. Thus the Illinois statute, which gives prosecutors discretion to seek or refuse to seek a death sentence, is clearly valid.

Finally, Gacy notes that in 1979 three justices of the Illinois Supreme Court, in a dissenting opinion, expressed the view that the discretion granted prosecutors by the Illinois statute was unconstitutional. People ex rel. Carey v. Cousins, 77 Ill. 2d 531, 397 N.E.2d 809 (1979). A fourth justice took the

same position in People v. Lewis, 88 Ill. 2d 129, 430 N.E.2d 1346 (1981). However in Lewis the constitutionality of that provision of the Illinois statute was upheld by a vote of 6 to 1. Moreover, in at least eleven subsequent decisions the Illinois Supreme Court has held that the grant of discretion to prosecutors in the Illinois statute is constitutional.* Therefore it is now the considered opinion of the Illinois Supreme Court that prosecutors may be granted discretion on whether or not to seek a death sentence.

In conclusion, prosecutorial discretion on whether to seek a death sentence is inevitable under any death penalty statute that could be drafted. Such discretion is exercised in practice by prosecutors in every jurisdiction which has the death penalty. This Court has held that the exercise of prosecutorial discretion in death penalty cases is constitutional and even desirable. Therefore Gacy has not given any valid reason for this Court to grant a writ of certiorari in this matter.

---

* People v. Raymond Lee Stewart, ___ Ill. 2d ___, ___ N.E.2d ___ (No. 56332, Nov. 30, 1984); People v. Owens, 102 Ill. 2d 145, 464 N.E.2d 261 (1984); People v. Albanese, 102 Ill. 2d 54, 464 N.E.2d 206 (1984); People v. Caballero, 102 Ill. 2d 23, 464 N.E.2d 223 (1984); People v. Silagy, 101 Ill. 2d 147, 461 N.E.2d 415 (1983); People v. Eddmonds, 101 Ill. 2d 44, 461 N.E.2d 347 (1984); People v. Williams, 97 Ill. 2d 252, 454 N.E.2d 220 (1983); People v. Davis, 95 Ill. 2d 1, 447 N.E.2d 353 (1983); People v. Kubat, 94 Ill. 2d 437, 447 N.E.2d 247 (1983); People v. Szabo, 94 Ill. 2d 337, 447 N.E.2d 353 (1983); People v. Gaines, 88 Ill. 2d 342, 430 N.E.2d 1046 (1981).

II.

THE ILLINOIS DEATH PENALTY STATUTE DOES NOT PLACE ANY BURDEN OF PROOF ON A DEFENDANT AT ANY STAGE OF THE PROCEEDINGS.

Gacy argues that the Illinois death penalty statute is unconstitutional in that, after a defendant is proven eligible for a death sentence, the burden is placed on that defendant to prove that death is not an appropriate punishment. This is simply not true. As interpreted by the Illinois Supreme Court, the Illinois statute does not place any burden of proof on a defendant at any stage of the proceedings. Specifically, for the following reasons Gacy's argument does not justify a grant of certiorari:

1. Gacy has waived this argument by failing to raise it in the Illinois Supreme Court.

2. The Illinois Supreme Court has held that there is no burden of proof on a defendant at any time during a death penalty hearing.

3. This Court has upheld the constitutionality of a Florida statute which was identical to the Illinois statute on this point. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Gacy never made in the Illinois Supreme Court the argument that he now relies on in his petition for a writ of certiorari. In fact, in Gacy's brief in the Illinois Supreme Court he advanced an interpretation of the Illinois death penalty statute which contradicts the interpretation he gives to the statute in his petition to this Court. Therefore Gacy has waived this issue.

In the Illinois Supreme Court Gacy discussed the burden of proof at the second stage of a death penalty hearing in Issue 31 of his brief. Gacy's Issue 31 was entitled:

The Failure Of The Illinois Death Penalty Statute To Require That The State Prove Beyond A Reasonable Doubt The Absence Of Mitigating Factors Sufficient To Preclude The Death Penalty Violates Due Process Of Law And The Eighth Amendment.

In other words, Gacy argued, not that he had any burden of proof as to mitigating factors, but that as a matter of constitutional law the State was required to prove the absence of mitigating circumstances beyond a reasonable doubt. In its opinion in this case the Illinois Supreme Court decided only that the absence of mitigating factors need not be proven beyond a reasonable doubt by the State. People v. Gacy, 103 Ill. 2d 1, 103, 468 N.E.2d 1171, 1216 (1984).

In fact in his brief in the Illinois Supreme Court, Gacy cited the Brownell decision for the proposition that, when a judge or jury in Illinois weighs aggravating and mitigating factors in a death penalty case, a "balancing process" takes place with no burden of proof on either side. (Gacy's Brief, p. 236); People v. Brownell, 79 Ill. 2d 508, 404 N.E.2d 181 (1980). Thus the interpretation Gacy gave to the Illinois death penalty statute in his brief in the Illinois Supreme Court contradicts the interpretation he gives to the statute in this Court.

Therefore at no point in his brief in the Illinois Supreme Court did Gacy argue that the Illinois statute placed on him any burden of proof to show the presence of mitigating factors sufficient to preclude the death penalty. He never attacked the constitutionality of the statute on those grounds. This was a wise tactical decision, since Gacy was also arguing in the Illinois Supreme Court that the trial record showed sufficient mitigation to preclude a death sentence. (Gacy's Brief, Issue 29) Therefore Gacy decided not to argue that the statute placed on him the burden to show that sufficient mitigating factors existed.

It is well-settled that this Court will not and cannot rule on issues which were never considered in state court and are raised for the first time in a petition for a writ of certiorari. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); Tacon v. Arizona, 410 U.S. 352, 93 S.Ct. 998, 35 L.Ed.2d 346 (1973). Gacy never made his current argument in the Illinois Supreme Court, nor, of course, did the Illinois Supreme Court ever rule on it. Thus there is no basis for a grant of certiorari on this issue. 28 U.S.C. sec. 1257.

Moreover, Gacy has misstated the Illinois law on this subject. He claims that under the Illinois death penalty statute he has the burden to show that mitigating factors exist sufficient to preclude a death sentence. But the Illinois Supreme Court has held that neither a defendant nor the State has any burden of proof as to mitigating factors, and that at no point during an Illinois death penalty hearing is there any burden of proof placed on a defendant. People v. Brownell, 79 Ill. 2d 508, 404 N.E.2d 181 (1980).

An Illinois death penalty hearing following a murder conviction is divided into two stages. At the first stage the State must prove beyond a reasonable doubt that one of a specific statutory list of aggravating factors exists. Ill. Rev. Stat. 1979, Ch. 38, secs. 9-1(f), 9-1(g), 9-1(h). If the existence of a statutory aggravating factor is proven beyond a reasonable doubt, then the defendant is eligible for a death sentence, and the judge or jury proceeds to a hearing in aggravation and mitigation. At this second stage the judge or jury weighs all aggravating and mitigating factors, and determines whether a death sentence is proper under the circumstances of the case. Ill. Rev. Stat. 1979, Ch. 38, sec. 9-1(e), 9-1(g), 9-1(h).

In Brownell the Illinois Supreme Court held that the second stage of a death penalty hearing, at which all aggravating and mitigating evidence is considered, involves a weighing or balancing process. In this process no burden of proof is placed on the State or the defendant. As the Illinois Supreme Court said in Brownell:

> Without doubt, a balancing process is required: while the precise weight to be given each aggravating and mitigating factor is not made a matter of numerical calculation, that is not a constitutional infirmity. Rather...the sentencing authority is given specific evidence to weigh, based on the particularized circumstances of the case.... 79 Ill. 2d at 404 N.E.2d at 194.

In many subsequent decisions the Illinois Supreme Court has repeated that the second stage of a death penalty hearing involves a process in which evidence in aggravation and evidence in mitigation are weighed and balanced against one another. People v. Owens, 102 Ill. 2d 145, 159, 464 N.E.2d 252, 260 (1984); People v. Eddmonds, 101 Ill. 2d 44, 68, 461 N.E.2d 347, 358-359 (1984); People v. Williams, 97 Ill. 2d 252, 265, 454 N.E.2d 220, 225 (1983); People v. Kubat, 94 Ill. 2d 437, 501, 447 N.E.2d 247, 278 (1983); People v. Jones, 94 Ill. 2d 275, 283, 447 N.E.2d 181, 185 (1982); People v. Gleckler, 82 Ill. 2d 145, 157, 411 N.E.2d 849, 855 (1980).

Thus at an Illinois death penalty hearing there is no burden of persuasion on a defendant. At the first stage the State has the burden of proving the existence of a statutory aggravating factor beyond a reasonable doubt. At the second stage the defendant can produce whatever mitigating evidence is available, and that evidence is to be weighed and balanced against the evidence

in aggravation. That process does not place a burden of proof on either party.

It is true that the Illinois statute provides that at the second stage of a death penalty hearing the judge or jury shall determine whether there are "...no mitigating factors sufficient to preclude the imposition of the death sentence...." Ill. Rev. Stat. 1979, Ch. 38, secs. 9-1(g), 9-1(h). However the Illinois Supreme Court has interpreted that statute in many decisions to require a weighing and balancing process. That interpretation is binding in proceedings before this Court. Fuller v. Oregon, 417 U.S. 40, 42 fn. 2, 94 S.Ct. 2116, 2119 fn. 2, 40 L.Ed.2d 642, 648 fn. 2 (1974); Coleman v. Alabama, 399 U.S. 1, 9, 90 S.Ct. 1999, 2003, 26 L.Ed.2d 387, 396 (1970). Thus it is not true that the Illinois death penalty statute placed any burden of proof on Gacy at any stage of the proceedings.

This issue concerning the constitutionality of the Illinois statute was resolved by this Court in the Proffitt decision, because on this point the Illinois statute and the Florida statute considered in Proffitt are identical. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In fact both the Illinois statute and the Florida statute were based in large part on the Model Penal Code. Ill. Rev. Stat. 1979, Ch. 38, sec. 9-1; Fla. Ann Stat sec. 921.141 (Supp. 1976-1977); Model Penal Code sec. 201.6 (Proposed Official Draft 1962). Under the Florida statute the judge and jury at a death penalty hearing were required to consider evidence on aggravating and mitigating factors. The statute provided that the judge and jury were to approve a death sentence if a statutory aggravating factor existed and there were insufficient mitigating circumstances to outweigh the aggravating circumstances.

In Proffitt this Court held that the Florida statute was sufficient to avoid arbitrary and capricious imposition of the death penalty, and was therefore constitutional. The Illinois death penalty statute, as interpreted by the Illinois Supreme Court, also requires that aggravating and mitigating factors be weighed, and that a death sentence be approved only if there are insufficient mitigating factors to outweigh the aggravating factors. Gacy's argument is that the weighing and balancing process in the Illinois statute creates an undue chance that a death sentence will be imposed where it is not appropriate. That argument was rejected by this Court in Proffitt.

The Illinois statute clearly meets the constitutional requirement that the jury's discretion be guided at death penalty hearings, but that an individualized determination be made on a death sentence based on the character of

the individual and the circumstances of the crime. Zant v. Stephens, 456 U.S. 410, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The class of persons eligible for the death penalty is restricted by the requirement that one of a limited list of statutory aggravating factors be proven to exist beyond a reasonable doubt. If eligibility is proven, then the jury considers all relevant aggravating and mitigating information, and weighs and balances all aggravating factors against all mitigating factors. No burden of proof is imposed on either party when the aggravating and mitigating factors are weighed. In fact a burden of proof at that stage would have little meaning, since the jury is not just making factual findings, but weighing and balancing the significance of many different facts.

In the Zant decision this Court found that, once a statutory aggravating factor is proven, no standard or burden of proof need be employed to guide the jury in weighing the evidence on whether a death sentence is appropriate. Zant v. Stephens, 456 U.S. 410, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Thus the Illinois statute is constitutional, even though it does not impose a burden of proof when the jury weighs aggravating and mitigating evidence.

In conclusion, Gacy has waived this issue by failing to raise it before the Illinois Supreme Court. In fact Gacy's interpretation of the statute before the Illinois Supreme Court contradicts the interpretation he gives it in his petition for a writ of certiorari. Gacy is incorrect when he asserts that under the Illinois death penalty statute he had the burden of persuasion on the question of whether a death sentence was appropriate in his case. The Illinois death penalty statute, as interpreted by the Illinois Supreme Court, does not place a burden of proof on the defendant at any stage of the proceedings. Since Gacy's argument has been waived and is based on an incorrect interpretation of the statute, his request for a grant of certiorari should be denied.

CONCLUSION

Respondent, the People of the State of Illinois, respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

NEIL F. HARTIGAN,
Attorney General,
State of Illinois,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601,

Attorney for Respondent.

RICHARD M. DALEY,
State's Attorney,
County of Cook,
Room 500 Richard J. Daley Center,
Chicago, Illinois 60602,
MICHAEL E. SHABAT,*
KEVIN SWEENEY,
Assistant State's Attorneys,
Of Counsel.

*Counsel of Record
(312) 443-5496

OPINION

(4)

SUPREME COURT OF THE UNITED STATES

JOHN GACY *v.* ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 84–5811. Decided March 4, 1985

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Supreme Court of Illinois insofar as that judgment leaves petitioner's death sentence undisturbed. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari and vacate the death sentence imposed here.

The petitioner challenges two aspects of the Illinois capital sentencing scheme, each of which poses a serious constitutional question. First, after a sentencing jury has found one or more aggravating factors, the statute imposes on the defendant the burden of adducing mitigating evidence "sufficient to preclude imposition" of the death penalty. Ill. Rev. Stat., ch. 38, §9–1(g). The statute thereby places on the defendant the burden of proving that death is not appropriate in his particular case. As I have stated before in reference

to this statute, I do not read our precedents as permitting a defendant to bear the risk of persuading a jury that his life should be spared. See *Jones* v. *Illinois*, —— U. S. —— (1983) (MARSHALL, J., dissenting from denial of certiorari).

Second, the Illinois statute places the decision on whether to convene a death hearing solely in the hands of the individual Illinois prosecutor. Ill. Rev. Stat., ch. 38, §9–1(d). As a result, it vests in the prosecutor the unlimited and unguided discretion to select, among potential capital defendants, those who may be subject to the death penalty. The statute thereby introduces into the sentencing phase of trial—a phase in which our precedents require that discretion be carefully guided—an element of completely unbridled discretion, and it invites irrational and arbitrary decisionmaking. See *Eddmonds* v. *Illinois*, —— U. S. —— (1984) (MARSHALL, J., dissenting from denial of certiorari). Because I continue to believe that this Court should consider both of these issues, I respectfully dissent from the Court's denial of certiorari in this case.

JUSTICE POWELL took no part in the consideration or decision of this petition.